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# SOUTHERN LAW REVIEW,

—AND—

.CHART OF THE SOUTHERN

## LAW REVIEW UNION.

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JANUARY, 1874.

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FRANK T. REID, . . . . EDITOR.

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# INDEX TO VOL. III.

## A.

	PAGE.
Abatement,.....	154, 314
Acceptance, .....	60, 81
Accord and Satisfaction,.....	81, 314
Account, stated,.....	81
“ .....	314, 353, 671
Acknowledgment, .....	314
Acquiescence, .....	299
Action,.....	82, 314, 551, 671
Administration,.....	83, 315, 353, 672
Administrators and Executors,....	83, 154, 315, 551, 672
Admiralty, .....	701
Admissions,.....	552
Advancements, .....	84, 299
Adverse possession,.....	552
Advocate, Duty of, .....	393
“ Timidity of Young,.....	395
Affidavit, .....	60
Agency,.....	84, 316, 353, 673
Agent .....	58, 85, 154, 316, 359, 674
Agreement,.....	299
Alabama Reports, Vol. 47,.....	189
Alien, .....	85
Alien Enemy,.....	317
Alibi,.....	316
Alimony, .....	552
Alteration, .....	86
Amendments, .....	552, 674, 524
“ XIII. and XIV.,.....	524
Amercement, .....	552
Ancient Lights, .....	86
Annuity, .....	539
Appeal.....	86
“ and Review,.....	154
Appeal Bond,.....	353, 674
Appellate Court,.....	317
Appropriation,.....	317
Arbitrament and Award,....	87, 317, 553, 675
Assault and Battery,.....	87, 353, 675
Assessment and Taxation,.....	87
Assessors,.....	553
Assignee, .....	88, 155, 317 359

	PAGE.
Assignment, .....	60, 88, 553, 675
Assumpsit,.....	88, 675
Attachment,....	89, 318, 353, 553, 676, 701
“ to satisfy final judgment, .....	154
Attorney, .....	354, 677
Auction,.....	553
Autre Faut Acquit or Convict,.....	554
Award, .....	89, 677
Ayala's burlesque of the manners of Lawyers, .....	6

## B.

Bailee, .....	539
Bailment,.....	90, 677
Banks, .....	91, 318, 354, 554
Bank Directors,.....	90
Banker's Lien,.....	540
Bankrupt, .....	555
Bankrupt Act,.....	90, 546, 678
Bankruptcy,.....	91, 154, 318
Bastardy, .....	354
Beecher Scandal,.....	728
Bench of England in 1807,.....	1
Biddings, Opening the,.....	423
Bill of Exceptions,.....	319, 555, 678
Bill of Exchange,.....	60, 300, 540, 678
Bill of Lading,.....	300, 540
Bill sent by post,.....	301
Bills and Notes,.....	91, 92, 93 319, 679
Bissell's Reports, Vols. I., II., III.,...	383, 385
Blackstone, Cooley's,.....	386
Bond, .....	93, 320
Bond for title, .....	93
Book Notices,.....	187, 377, 588
Boundaries, .....	93, 679
Bridge, .....	320
Broker, .....	94, 320, 555
Building Contract,.....	61
Building Fund Association,.....	321
Burden of Proof,.....	679
Burton, in his Anatomy, reckons lawsuits as among the most cer- tain causes of melancholy, .....	11
Butler's poetic satire on lawyers,.....	12

C.		PAGE.		PAGE.
California Citations,.....		382	Conditional Estate,.....	322
Cancellation of Deed,.....		354	“ Sales,.....	323
Capacity to make Will,.....		97	Confederate Courts, .....	323
Capital Punishment,.....		397	“ Money,.....	103
Captured Property,.....		354	“ States, .....	683
Carlyle's Apostrophe to Fouquier			Conflict of Jurisdiction,.....	310
Tinville, .....		12	“ Laws, .....	323
Carrier, .....	94, 321,	680	Consideration, .....	323, 356, 556
Cause of Action, .....	95, 96,	681	Consolidation, of Suits,.....	103
Central Law Journal,.....		385	“ of Railroads,.....	556
Certiorari, .....	555,	681	Constable, .....	683
Champerty, .....	97,	354	Constitution,.....	103
Chancellor Cooper, .....		391	Constitutional Law, 103, 310, 323,	
Chancery,.....	321,	682	356, 546, 556, 684	
“ Jurisdiction,.....	97,	354	Construction of Statutes,....	324, 547,
“ Pleading, .....		97	557, 168	
“ Practice, .....	98,	355	Constructive Notice,.....	541
“ Sales, .....		356	Contempt, .....	156
“ “ Opening the Bid-			Contested Elections,.....	104
dings,.....	423,	708	Continuances, .....	557, 684
Charge on Land .....		322	Contracts, Chitty's, .....	594
Charge of Court,.....	354,	682	Contracts,...104, 105, 302, 322, 324,	
Charities, .....	98,	301	357, 541, 547, 557, 684	
Charter-party, .....		61	Contributory Negligence, .....	685
“ right of charterer to			Conversion, .....	106, 325, 685, 688
throw up where vessel disabled,..		70	Conveyance,.....	106, 325, 686
Chattel Mortgage, .....		98	Corporations,.....	107, 326, 557, 686
Checks,.....	322,	555	Corporation Cases, American,.....	595
Chicago Legal News,.....		193	Costs,.....	108, 155, 328, 357, 688
Child in ventre sa mere,.....		301	Counter Claim, .....	558
Children,.....		99	Courts, .....	328, 350
Cities,.....	96, 97, 322, 556,	682	Court and Jury,.....	547
Claim, .....		683	Covenants,...108, 303, 328, 541, 558,	687
“ and Delivery of Personal			Criminal Trials, .....	106
Property,....		99	“ Practice,.....	357
Code of Georgia,.....		187	“ Law,.....	328, 687
Codification,.....		222	“ Law, Wharton's,.....	379
Collateral Agreement,.....		301	Cumulative Legacies, .....	303
Comic Blackstone, The, .....		14	Custom,.....	73, 329
Compromise and Settlement,.....		102	“ of Stock Exchange,.....	303
Commercial Paper,.....		155	“ of Trade, .....	63
Commission,.....		541	Cy-pres,.....	63
Commission Merchant,.....		99		
Common Carrier,..99, 100, 101, 310,				
356, 170, 546, 556				
“ Law, .....		102		
Company, .....		302		
Condition, .....	62, 310			
Conditions of Sale,.....	62, 302			

## D.

Damage to part of Goods insured,...	69
Damages,...108, 329, 358, 558, 688,	284
“ Mayne's Law of, etc.,.....	588
“ Sedgwick's Law of, etc.,...	589
Daniel on Negotiable Instruments,...	392
Death,.....	304

	PAGE.		PAGE.
Debtor and Creditor,.....	559, 689	Ecclesiastical Courts, .....	330
Decedent's Estates,.....	690	Ejectment,.....	112, 561, 692
Decisions, Recent American,....	168,	Eldon, Lord Chancellor,.....	1
170, 184, 366, 572, 578, 584, 701,		Election,.....	64, 330, 692
708, 712		Election and Election Law,.....	112
Decree,.....	329, 690	Emancipation,.....	113
Dedication, .....	559, 690	Eminent Domain,.....	331, 561, 386
Deed,.....	109, 330, 559	Enactments against the Legal	
Defenses, .....	110	Fraternity,.....	15
Delegation of Statutory Powers,.....	804	Epitaph, Ben Jonson on Justice	
Delivery, .....	691	Randall,.....	5
Delusions of Testator, .....	79	Equity,....	65, 113, 331, 547, 561, 692, 389
Demand and Notice,.....	156	" Jurisdiction, .....	114 531
Demurrer, .....	110	" Pleading and Practice, ....	114, 331
Deposit, .....	311	Equitable Set-off,.....	113
" of Deeds, .....	304	Erasures,.....	115
Deposition,.....	547	Error, .....	115
DeQuincy's fling at Lawyers,.....	11	Erskine, Lord,.....	2
Descents, .....	330	Estates of Decedents,.....	331, 693
Devise and Legacy, .....	560	" " Trustees, .....	542
Dickens, an Inveterate Enemy of		Estoppel,.....	60, 116, 548, 561, 693
English Law, .....	11	Evidence,.....	65, 116, 117, 311, 331,
Digest of English Law Reports, 59,		358, 548, 561, 694	
299, 539, 668		Exception,.....	118, 358
" " Recent Bankruptcy De-		Exchange and Re-Exchange, etc,....	284
cisions,.....	154	Exclusive Power of Appointment,...	608
Digest of United States Supreme		Execution, .....	158, 332, 562 250
Court Decisions,.....	310, 546	" Creditor,.....	66
Digest of State Reports, (selected),		Executor, etc,.....	67, 118, 332, 562 696
81, 314, 551, 671		" de son tort, .....	305
Digest of Recent Unreported Deci-		Exemption.....	562, 170
sions,.....	353	Express Companies,.....	118
Director,.....	64		
Discharge in Bankruptcy, effect of, ..	157	F.	
Discretion,.....	110	False Demonstratio,.....	543
Disinherit, The right to, without		Federal Decisions, Digest of,.....	192
cause,.....	444	Feme Covert,.....	358
Dismissal of Proceedings, .....	156	Fence,.....	118
Distribution,.....	691	Fiduciary Character,.....	158
Dividend,.....	156	Fifty per cent. clause in Bankrupt	
	30	Act, .....	158
	89	Fire Insurance, .....	119
	11	" " Decisions, Digest of,	191
	95	Fixtures,.....	562
	60	Fixtures, Law of, Brown's,.....	502
	92	Flowage of Land, .....	119
	12	Foot's Lame Lover, .....	10
	77	Forcible Entry and Detainer, .....	696
		Forbearance of Buyer at Seller's	
		request, .....	67
		Foreign Judgment, .....	563, 18

	PAGE.
Foreign Sovereign, .....	67
Former Adjudication,.....	119, 333
Fraud,.....	120, 333, 359, 548, 563, 696
Frauds, Statute of,.....	120, 333, 696
Fraudulent Conveyance,.....	68, 120 548
"    Representations.....	305

## G.

General Assembly,.....	333
Gift,.....	68, 121, 305
Gifts, Inter Vivos,.....	396
Gold Contract,.....	121
Good-Will,.....	121
Goethe's Caricature of the Venerable Sages of the Law,.....	8
Government, Modern Theories of, .....	28, 199, 407
Grant, ....	121
Grant, Sir Wm.,.....	2
Guardian, .....	121
"    and Ward,.....	122, 333 696

## H.

Habeas Corpus,.....	122
Highways,.....	122, 334, 563
Homestead, .....	122, 158, 359
Homicide and Defence of Insanity, ..	621
Husband and Wife,....	122, 334, 563 697

## I.

Illegal Consideration, ..	69
Illegality,.....	697
Illegitimate Child,.....	69, 543
Improvements,.....	124
Incomplete Gift, ..	305
Indictment, .....	124
Indorsement, unauthorized, by one of two Partners.....	60
Indorser, etc.,.....	158, 697
Infancy,.....	124, 334
Infants,.....	334, 548
Injunction, ..	125, 161, 334, 359, 563, 698, 390
Injunction before Bill filed,.....	69
Insanity, etc.,.....	621
Insolvent,.....	311
Instructions, .....	334 366
Insurance, ..	126, 306, 334. 563, 698
"    Companies, .....	127, 584
Insurance, May's,.....	382

	PAGE.
Insurance, Marine,.....	69
Interest, .....	127, 548
Internal Revenue, .....	311
International Law, Private,.....	493
Interrogatories, .....	127

## J.

Jests about Law and Lawyers,.....	15
Joint Effects, .....	250
Joint Stock Association,.....	127
"    Tenants, .....	335
Judges, Private Communications to, ..	508
Judgment, .....	128, 335, 359, 698
Judicial Separation,.....	543
"    Sales, .....	564
Jurisdiction,.....	128, 161, 312, 564, 184
Juror, .....	335
Juror, Disqualification of,.....	572
Jury,.....	129, 360, 698, 394
Justice of the Peace, .....	335
Justices' Courts,.....	335
Juvenal's Satire of certain Advocates	6

## L.

Laches,.....	129, 335, 518
Landlord and Tenant, .....	130, 336, 698
Land and Land Titles,.....	129, 335
"    Damages,.....	129
Law and Lawyers, London,.....	400
"    "    "    New York,.....	401
Law, The, How it has fared in Literature, .....	5
Lawyer and Client, .....	399
Lawyers, excluded from Sir Thos. Moore's Utopia,.....	16
Lease,.....	130, 162, 564
"Legal Memory," Origin and History of,.....	402
Legal Maxims, Broom's,.....	595
Legal Restraints,.....	396
Legislature, ..	131
Levy,.....	162
Liability of Master for Negligence	
"    Servant,.....	72
"    Solicitor,.....	544
Lien,.....	131, 565, 698
Life Insurance, ..	131, 312
Light and Air,.....	544, 668
Limitation of Actions,.....	131, 337, 360, 565
"    Statute of,.....	132, 565, 699

Lis Pendens,.....	PAGE. 132
Lope de Vega's ridicule of the Profession,.....	7
Lord's Day,.....	132
Loss of Freight,.....	70
Louisiana,.....	395

**M.**

Malicious Prosecution,.....	337
Management by Trustees, .....	306
Mandamus, .....75, 132, 360, 549,	565
Mandatory Injunction,.....	544
Mandeville, Sir John, Description of Lawyers,.....	9
Manslaughter,.....	132
Marriage Settlement,.....	133
Married Women,.....133, 163, 312	
Master and Servant,.....72, 133, 544, 549, 565	
Measure of Damages,.....72, 337	
Medical Jurisprudence, Wharton's and Stille's, .....	191
Medical Jurisprudence, Elwell's,....	192
" " Taylor's.....	591
Milton's Estimate of Lawyers, .....	6
" Sonnet to Cyriac Skinner,..	6
Minor, .....	565, 699
Misdescription in Will, .....	73
" " Ancient Docu- ments,.....	76
Misrepresentation of Fact, .....	59
Mistake, .....	337
Montesquieu's Spirit of Laws,.....	187
Mortgage,...134, 162, 313, 338, 360,	566
	699
Mortgage by Deposit, .....	73
" " Devise,.....	306
Motions,.....	360
Municipal Taxes,.....	566
Murder, the Parkman,.....	237

**N.**

National Banks,.....	134
Navigation,.....	134
ecessaries in a Foreign Port,.....	549
Negligence,...134, 338, 544, 565, 170,	699
" Law of, Campbell's,.....	597
Negotiable Instrument,..73, 135, 313,	28
New Trial,.....135, 340, 361	

New York Supreme Court Reports, Vol. 1, .....	PAGE. 383
Nonsuit,.....	136
Notaries, .....	136
Notes,.....194, 391, 599, 728	
Notice,.....	549
Novation, .....	567
Nuisance,.....136, 567	
Nul tiel record, .....	184

**O.**

Obligations in Roman Law, Savigny's Treatise, .....	594
Officer, .....	567
Opinions of the Court, .....	549

**P.**

Parent and Child,.....	567
Parkman Murder,.....	237
Partition,.....136, 340, 361	
Partners,.....137, 307	
Partnership,.....137, 163, 340, 361,	250
Passenger,.....	341
Patent, .....	549
" Reports, Fisher's,.....	192
Pawn,.....	138
"People, The," .....	516
Plea of Discharge in Bankruptcy,....	164
Pleading,.....138, 341, 362, 569	
Pleading and Practice, .....	139
Pledge,.....	139
Power of Sale,.....	341
Powers,.....	567
Practice,.....139, 163, 341, 342, 362,	568
Practice at Common Law,.....	342
" in Probate Courts, etc.,..	381
Practice in Supreme Courts, .....	139
Precatory Trust, .....	545
Preference of Creditors,.....	163
Presumption, .....	140
Presumptions of Law,.....	712
Presumptions, Legal,.....	247
Principal and Agent,... ..74, 140,	568
" " Surety,.....343, 362	
Privilege Tax,.....274, 484	
Probate Duty, .....	307
Process, .....	568
Promissory Note,.....73, 140, 344,	568
Proof of Debt,.....163, 307	
Proviso,.....	306

	PAGE.
Public Lands, .....	140
Possession, .....	341
Punishment, Philosophy of, .....	533
Purchaser, .....	344

## Q.

Quo Warranto, .....	141
---------------------	-----

## R.

Rabelais' Ridicule of Lawyers, .....	7
Racine's Burlesque of the Machinery of Justice, .....	7
Railroad Corporations, .....	141, 345
Railroad Stock, .....	142
Railroads, .....	141, 345, 550, 568, 656
Railway, .....	74, 75
Railway Law in Illinois, .....	384
Rebellion, The, .....	47, 550
Receiver, .....	142
Recent American Decisions, .....	168
Recognizance, .....	142, 345
Recoupment, .....	142
Redemption, .....	142, 345, 363
Rehearing, .....	142
Relief from Forfeiture, .....	308
Religious Societies, .....	569
Remedies for Torts, etc, Hilliard's, .....	378
Removal of Causes, .....	142, 345
Replevin, .....	76, 143, 363
Reports, 52 N. H., .....	193, 380
Repugnant Gift, .....	669
Reputation, .....	169, 346
Revenue Collector, .....	363
Revenue, Fraud on, .....	548
Res Judicata, .....	143
Resulting Trusts, .....	346, 363
Revivor, .....	143
Revocation of Will, .....	79, 80
Reward, .....	144
Right, Immemorial Exercise of a, ...	76
Right of Way, .....	77

## S

Sale of Business, .....	77
Sales, .....	144, 165, 346, 569, 388, 423, 493
Scire facias, .....	145, 346, 363
Scott, Sir Wm, .....	3
Separate Estate, .....	145, 166, 454
Set-off, .....	145, 166
Settlement, Voluntary, .....	578
Sewer, .....	569
Shakspeare's allusions to Law and Lawyers, .....	11
Shelley's Case, the Rule in, explained, .....	18
Shelley's Case, The Reasons and Policy of the Rule, .....	22
Shelley's Case, Why the Rule should be retained, .....	24
Sheriff, .....	146, 165, 346, 363
Slander, .....	346

	PAGE.
Slander and Libel, Townshend, .....	191
Slaughter-house Cases, .....	476
Solicitor's Lien, .....	308
Spirituuous Liquors, .....	169
State Government, .....	347
State Reports, Digest of, .....	314
Statute of Frauds, ..78, 146, 308, 347, .....	669
"    "    Limitations, .....	146, 569
Statutes, Construed, .....	347
Stay Laws, .....	395
Stock Broker, .....	146
Supervisor, .....	569
Supreme Court of United States, Digest of Decisions of, .....	310
Surety, .....	147, 347
Surviving Partner, .....	167
Swift's estimate of Lawyers, .....	5

## T.

Tax, .....	147, 348, 364, 550, 569
Tax Privilege, .....	274, 484
Tax Sales, .....	348, 364
Tax Title, .....	570
Taxation, .....	364, 569
Telegraph, .....	147
Tenant by Curtesy, .....	308
Tender, .....	348
Testamentary Paper, .....	78, 349
"    Suit, .....	78
Theatrical Engagement, .....	79
Tichborne Trial, .....	403
Timber, .....	349
Title, .....	147, 348
Town, .....	147, 349
Trade Mark, .....	148
Trespass, .....	148, 349, 364
Trial, .....	148
Trust, etc., .....	148, 349, 545, 570
Trustee, .....	167, 300, 349

## U.

Use and Occupation, .....	550
Usury, .....	149, 167, 364, 570, 396

## V.

Vendor and Vendee, .....	150, 350, 669
Vendor's Lien, .....	150, 351
Vested Rights, .....	151
Victor Hugo, two sketches of criminal trials, by, .....	8
Voluntary Settlement, .....	578

## W.

War, .....	151
Warranty, .....	364, 670
Way, .....	151, 571
Western Jurist, Vol. VII., .....	384
Will, .....	309, 352, 364, 571
"    of Married Woman, .....	309
Witness, .....	352

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*THE BENCH OF ENGLAND IN 1807.*

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An old manuscript diary kept by the late Chief Justice Taylor, of North Carolina, during a visit to England in 1807, has fallen into our hands. Though written *currente calamo*, and intended for the instruction and entertainment of his own household, we find in it many things that would interest the general reader—and some glimpses at the bench of England, in those days, which will interest the members of the legal profession, several of which we extract.

LORD CHANCELLOR ELDON.

The Chief Justice then states his impressions of the distinguished Lord Chancellor:

“To-day I visited Lincoln’s Inn Fields, where I understood the Lord Chancellor was hearing causes. The hall is spacious, and the floor thickly carpeted. I confess my astonishment was great when I entered to hear a counsel addressing the Chancellor in ungrammatical language, delivered in a harsh brogue and stentorian voice. Surely, I thought, there must be some character of strength in his learning to compensate for  
ound him uninformed—and  
g at the faces of the other  
eavoring to stifle a laugh.  
ieral mirth, but made great  
fore his face, and sometimes  
aming it. Hale, for such  
made a very silly speech to  
He was replied to by a Mr.

Harte, in a very clear and logical manner, and the Lord Chancellor gave an opinion with as much deliberation as if he had listened to an able discussion on both sides. Though the faces of the Lord Chancellor and his brother are totally different, yet a little examination discovers a family resemblance. The features of the former do not bespeak so much of genius, of deep thought or of firmness, but more of suavity and benevolence. I should pronounce him to be a man possessing more of the milk of human kindness, and far less energy of mind and power of investigation. His character, as a Chancellor, is that of delaying business from his extreme caution—and from the fear of doing wrong, doing little or nothing. But whatever he does is considered well done.

LORD ERSKINE AND SIR WM. GRANT.

As a Chancellor Lord Erskine gave great satisfaction—not so much for the correctness of his decrees as for the promptness and decision with which he pronounced them. He took uncommon pains to prevent the delays for which the court was so justly complained of—and the officers of the court would all have been satisfied at his remaining in office. But the mind, whose character as a chancery lawyer, rises far above that of all others in England, is Sir William Grant, the Master of the Rolls. The Chancery Bar unanimously speak of him as a man equal, if not superior, to any one who has ever presided in that court. He has been twice pressed to accept the seals, but prefers the plodding permanence of his present inferior situation, to the more miscellaneous, splendid, but precarious one of Lord Chancellor. He is a grave and studious man, and upon all occasions, maintains the dignity of the judicial character. Judge, then, of his feelings upon the following occasion, which was related to me by the best authority, and may be relied on. Lord Erskine had called upon him as an assizer in a very novel and intricate case. They had heard several arguments, and the Chancellor had appointed a day when he would call upon the Master of the Rolls, and conduct him to his country seat at Hampstead, where they might discuss the matter at perfect leisure. The Master of the Rolls was very much surprised when Erskine drove up to his house, in Chancery lane, in a gig tandem. He could not, however, decline the exhibition, and away they drove through the most populous part of London, Lord Erskine displaying his dexterity in driving—and now and then cutting a fly from the leader's ear. The grave and dignified Master of the Rolls was much an-

noyed by this freak of the Lord Chancellor, but bore it with the best grace he could muster. The decisions of the Master of the Rolls are now considered so important to the equity jurisprudence of the country, that they are about to be collected and published. With respect to Lord Erskine, the intelligence I collected was that he was so well satisfied with the power and patronage of office as to be very anxious to retain it, and to have been vexed and mortified at the vicissitude which deprived him of it—still temporizing, however, to retain his son in the diplomacy for two years, so that he may be afterwards entitled to the pension of two thousand pounds sterling, which is the consequence of that tenure of office.

SIR WILLIAM SCOTT.

When I entered the court room, the King's advocate, Sir John Nicholls, was in the act of delivering an argument against an unfortunate American ship libeled for a breach of blockade in entering the port of Leghorn. His manner was cold, dry and unanimated. His argument confused, and the slightest interruption from the opposing counsel, occasioned a perplexity from which he could, with difficulty, recover himself. A youthful Doctor, who, together with Doctor Lawrence, defended the ship, ventured, in the most modest and unassuming manner, to correct his statement with respect to a fact—the distance from Leghorn to Milan; but the advocate, instead of availing himself of the suggestion, and benefitting from the hint, almost bent himself, and addressed the Doctor with infinite affectation, requesting him to reserve what he had to say, until he had finished his argument. Doctor Lawrence made a sensible argument in defence, but his voice is like the hollow blast of a distant whirlwind—now bursting on the ear like an explosion of thunder—then dying away in an interrupted and unmusical cadence. When the counsel had finished, I placed myself near the Judge that I might particularly examine his countenance and more distinctly hear all he should utter. From the low and solemn manner in which he asked several questions for information during the trial, I was apprehensive that I could not hear him in the place where I first stationed myself. But in this, I was altogether deceived—for his voice, as if partaking of the energy which his mind had collected for the occasion, was full-toned and sufficiently loud to be heard in every part of the room. His statement of various facts in the case, which were not a little complex, exhibited a striking specimen of the *lucidus ordo*. He appeared to have collected all of them from the depositions during the

trial, and to have repositèd them in his mind, with an arrangement the most methodical. After he had thus stated the case in a manner to arrest the attention of all who heard him—he proceeded to lay down the principles which had been sanctioned by former adjudications, and to apply them to the case under consideration. His reasoning was conclusive; his phrases well selected and elegant; his manner impressive and dignified. And, if his judgment was *ex tempore*, I may safely pronounce it to be the most perfect thing of the kind I ever heard. It is impossible to examine the physiognomy of Sir William Scott without being inspired with that veneration which genius, corrected and disciplined by learning and application, never fails to create. The fire of his eye marks a quick and intuitive power of disentangling the most intricate case—while the settled and manly composure of his features showed the severe scrutiny to which judgment subjected every doubt before it passed into conviction. His forehead is capacious and handsomely arched—his nose aquiline—his mouth, what Lavater would term, eloquent, and his face, altogether, would form an admirable model for that of a Roman Senator in the best days of the republic.”

## HOW THE LAW HAS FARED IN LITERATURE.

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The literature of every country and of every age abounds in ridicule of the law. Of the three learned professions, it has suffered most from authors, wits, penny-a-liners and pamphleteers. Reverence for religion and the dread of the church's anathema have restrained many writers from flings at theology, who have cast them unsparingly at the bar. In comparison with the ill-natured wit directed against the law, medicine has escaped lightly; even Rabelais, "the universal satirist," the merciless satirist especially of the judiciary levels no invective at the healing art.

Mr Butler, in his *Lawyer and Client*,<sup>1</sup> calls attention to the curious fact that the current of invective has often set strongest against the bar, at the very moment when it was doing its best and noblest work, in aid of social order, or of the progress of the race. In the seventeenth century, just after Hampden and his noble band had fought in the courts the battle of English liberty and constitutional law, the press was issuing tracts with such titles as these: 'The Downfall of Unjust Lawyers.' 'Doomsday drawing near with Thunder and Lightning for Lawyers,' (1645, by John Rodgers.) 'A Rod for the Lawyers,' (1659, by William Cole.) 'Essay Wherein is Described the Lawyers', Smugglers' and Officer's Frauds, (1675.) Congreve, about the same time, makes one of his stage characters say, that "a witch will sail in a seive, but a devil will not venture aboard a lawyer's conscience." Ben Johnson's epitaph on Justice Randall condenses in a couplet the popular estimate of the profession:

'God works wonders now and then,  
Here lies a lawyer, an honest man.'

Swift, somewhat later, in such pithy English as he alone could command, at the very time when Chief Justice Holt had just closed his noble career, and Lord Mansfield was beginning to win his great judicial fame, paints the profession as 'a society of men, bred up from their youth in the art of proving, by words multiplied for

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<sup>1</sup>*Lawyer and Client: Their Relation, Rights and Duties.* By William Allen Butler, New York. D. Appleton & Co., 1871.

the purpose, that white is black, and black is white, according as they are paid.' Milton describes the lawyers of his day as 'grounding their purposes, not on the prudent and heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions and flowing fees,' and his praise of Coke is offset by a censure of his brethren at the bar. His Sonnet to Cyriac Skinner, a grandson of Lord Coke, opens thus:

"Cyriac, whose grandson on the royal bench,  
Of British Themis with no mean applause,  
Pronounced, and in his volumes, taught our laws,  
Which others at their bar so often wrench."

The object of this paper is collect from various literatures some of the charges against the bench and bar. The result will be a polyglot indictment of the profession, which, however serious it may appear to "the *laity*," (as Lord Campbell styles the uninitiated), can hardly fail to amuse the defendants.

Ennius represents an old man as saying, after he had consulted three lawyers concerning the validity of his son's marriage, "Now, I am more uncertain than ever."<sup>1</sup>

Martial accuses the lawyers of venal invective:

*Verba et iras locant.*

Juvenal satirizes the show of prosperity, which he alleges the members of the profession ever strive to make. He points the finger of scorn at those advocates who, like Basilius, always introduced the mother of the accused, in order to move the tribunal by her tears.

Nor does he leave untouched the dullness of "clodpate judges," before whom the pleaders "must their vitals strain."

In Spanish literature, the fate of the law has been no better. Quevedo represents a devil who had entered into one of the offices of justice as complaining bitterly of his quarters.

Ayala in his Court Rhymes burlesques the tone and demeanor of lawyers:

When entering on a lawsuit, if you ask for their advice,  
They sit down very solemnly, their brows fall in a trice,  
"A question grave is this," they say, and calls for labor nice,  
To the counsel it must go, and much management implies,  
I think, perhaps, in time, I can help you in the thing  
By dint of labor, long and grievous studying,  
But other duties I must leave, away all business fling,  
Your case alone must study, and to you alone must cling."

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<sup>1</sup>This was quoted by Sir Phillip Francis in a tirade (aimed especially at Lord Eldon), against the obscurity of lawyer's speeches in Parliament.

LeSage makes Captain Rolanda justify the highway exploits of his band by the example of conquerors and lawyers. When Dr. Sangrado discovers his ring upon a patient's finger, he is gravely advised not to attempt its recovery by law, as the Courts appropriate instead of restoring what they obtain.<sup>1</sup> Lope de Vega ridicules the profession by representing one of its shrewdest members as being cheated by a simple peasant. This also occurs in the old French Play of *Maistre Pathelin*.

In French literature, the law has been covered with reproach. Racine burlesques the machinery of his justice in his *Les Plaideurs*, by introducing the trial of a dog. This was imitated from Aristophanes. When it is asked where the Judge designs to sleep, the answer is, "*a l'audience*." Rabelais, however, transcends all Frenchmen in ridicule of bench and bar. The term by which he designates lawyers may mean "thickmist swallowers," suggestive of Dickens' location of the Chancellor, "in the very heart of the fog," or it may mean "swallowers of farms," as indicating the greed of their rapacity. He delights to abuse Tribonian as the world's greatest villain, "who cuts morsels out of the law to suit his own interest and suppressed the remainder," and quotes with great glee the proposition of Cato, that the Courts should be paved with caltrops.<sup>2</sup> In arriving at the decision in *Kissbreech vs. Suckfist*, a decision at which all the learned doctors went into ecstasies, and which even delighted both litigants, Pantagruel's first step was to destroy all the papers, which are styled "truth-intangling."

Mr. Doublefee's description of attorney-land is a "place of deep valleys and craggy rocks, where lawyers spend their lives squeezing juice from grapes," (*i. e.* money from clients.) The maxim of Judge Bridoise, is "happy is the physician whose coming is desired at the declension of the disease." He, therefore, takes cases in their decadence, when the passion and patience and pockets of the litigants are exhausted. His method is first to make the parties drink—then to make them sleep—then to prove that these important steps have been taken—then to delay the hearing by every possible obstruction, and where no further excuse can be devised for deferring the cause—when, in the language of Lord Kenyon, "the last feather is plucked from the tail of procrastination," he resorts to the chance of dice, using large dice for

<sup>1</sup> It is a little singular that *plunder* originally meant to rob under legal process.

<sup>2</sup> Instruments with four iron points so disposed that three of them, being on the ground, the other projects upward.

large cases, small dice for small ones. When complaint of the "glorious uncertainty," of this jurisprudence is made to King Pantagruel, he refuses to remove the Judge, saying it is better that causes should be decided in that impartial way than by men whose hearts are full of wry passions.

Dumas, in that world renowned novel, the *Count of Monte Christo*, makes Lucien Debray quote a proverb from Rabelais, that there is no dinner so poor as a lawyer's, with the pregnant commentary "as if those fellows felt remorse." Victor Hugo, in his *Hunchback of Notre Dame*, relieves the sombre fatalism of that marvelous work by two sketches of criminal trials which are, perhaps, the most ludicrous ever drawn; we refer to the examination of Quasimodo by the deaf Magistrate, and to the mimicry of the gesticulations of the prosecuting attorney by the goat of La Esmerelda.

Nor has genius been more friendly to the law in Italian literature. Boccaccio in the Decameron burlesques learned judges in a story, very humorous, but not of the sort to repeat here. Petrarch, says Campbell, "in his epistle to posterity, vindicates his aversion to the dry and dusty walks of jurisprudence, representing the abuses, chicanery and mercenary practices of the law, as inconsistent with candor and honesty." His father put him at the University of Bologna, to study law, and, on several occasions, pounced upon and burned up the classics, (except Cicero), for which his son evinced so decided a preference. How true is the saying of Roger North, "the spectre that frights so stands at the entrance."

But Petrarch is not alone in the abuse of the "dusty purlieus of the law," into which parental folly sought to force the genius that refused to bid a farewell to the muse. Goethe's father and his good friend Hüsken, did all in their power to make him a jurisconsult. But the young German amused himself during the lectures on the *corpus juris civilis*, by drawing caricatures on his note-book, of the venerable sages cited as authorities. It is not surprising, then, to find in Faust the following estimate of law:

"Es erben sich Gesetz und Rechte,  
Wie eine ew'ge Krankheit fort,  
Sie schleppen von Geschlecht sich zu Geschlechte,  
Und rücken sacht von Ort zu Ort;  
Vernunft wird Unsinn, Wohlthat Plage."

In Goetz von Berlichingen, the conclusion of a law suit, of eight years standing, is celebrated by a marriage festival, during which,

one of the contestants declares that he had rather endure a fever for twice that period than to live over again his experience in litigation. "Wo unto you, lawyers," must have been one of Luther's favorite texts. "We have to thank the lawyers," said he, "for filling the world with such an infinitude of evasions, shifts, subterfuges and chicanery, that matters have become worse than at the tower of Babel. There no man could understand his neighbor if he would. With us, thanks to the knave lawyers, no man will understand his neighbor if he can. O Sophists! pests of the human race, I address you full of indignation, but I am not clear that I should speak otherwise if I were cool."

"Law must doff her cap," he repeatedly declared, "in the presence of theology." "The struggle between lawyers and theologians is undying." When he heard that the degree of Doctor of Laws was to be conferred on a learned jurisconsult, he said, "there will be another viper hissing against the clergy." Schiller in *die Räuber* represents a lawyer as having won by chicanery a large estate for a certain count, and as they were returning in high glee from Ratisbon, the hero stops the equipage, denounces the legal fraud, and puts a summary end to the perpetrator. But why give particular instances, when a national proverb is in point, "*Juristen bösen Christen.*" This suggests a similar proverb prevalent during the middle ages, "*Legista Nequista.*"

"The literature of our mother tongue," says Mr. Butler in his *Lawyer and Client*, "reflecting the current opinion of each succeeding generation, is full of instances of coarse abuse or sharp satire directed against lawyers, by authors, wits, pamphleteers, and penny-a-liners." In the vision of Piers Ploughman, the activity of Mede<sup>1</sup> among the bench and bar, is a subject of lament and anathema. Chaucer says of his sergeant:

"Of fees and robes had he maney on,  
So grete a purchaser was nowher non."

Sir John Mandeville in his "*Fable of the Roses*," writes:

"They put off hearings willfully  
To finger the refreshing fee,  
And, to defend a wicked cause,  
Examine and survey the laws,  
As burglars stores and houses do  
To see where best they may break through."

Sir Thomas Browne cautions his reader, "Let not the law be the

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<sup>1</sup>The spirit of bribery.

non-ultra of thy honesty." Ben Jonson in his *Volpone or the Fox*, speaks of a lawyer as one with

"—So perplexed a tongue,  
And loud withal, that would not wag, nor scarce  
Lie still without a fee."

Beaumont and Fletcher give us a vivid idea of the litigious warrior in the little French lawyer, LaWrit, who even challenges the Judge for deciding against him. Charles Macklin, in his *Love a la Mode*, defines law as a "hocus pocus science, which smiles in yer face while it picks yer pocket." In his *'Man of the World,'* Sergeant Eitherside exhibits a mind, pliable to every touch of interest. While he is conferring with Counsellor Plausible, Sir Pertinax says to Lord Lumbercourt, "The interest of lawyers is that all mankind should be at variance, for disagreement is the very manure with which they enrich and fatten the land of litigation and as they find it constantly produces the best crop, they will always lay it on as thick as they can." In Massinger's *New Way to Pay Old Debts*, Sir Giles Overreach gives, as a reason for conferring judicial office on Justice Greedy that he might "do his part for my advantage," "against his conscience and his knowledge too." In Foote's *Lame Lover*, when Facias says that he can not find a precedent for a case, Sergeant Circuit is nothing daunted, "Then I'll make one myself, *aut inveniam aut faciam* is my motto." His son Jack informs him that in a suit upon a note the plaintiff had three witnesses to prove a consideration, "admit it," suggests the wily counsellor, "and have four to prove payment." We are also instructed with the following dialogue: Sergeant Circuit, "How many points are the great objects of practice?" Jack, "Two." "Which are they?" "First, to put a man into possession of what is his right; and second, to deprive a man of what is really his right, or keep him as long as possible out of possession." "Good, boy! If an able advocate has his choice, should he take the right side or wrong?" "The wrong." "Why so?" "Because a good cause speaks for itself, while a bad one demands an able counsel to give it a color." "Very well, but in what respects will this answer to the lawyer himself?" "In two, first, his fees rise in proportion to dirty work, and second, he gains greater reputation for victory in a desperate case." When Woodford proposes for Charlotte, he says, "I flatter myself that as justice is on my side, I shall have no contemptible fortune to throw at her feet." Justice," roars the Sergeant, "What signifies justice? Is the law on your side?" The gown and ermine find no eulogist in Shak-

speare. Hawkins and Reed suppose that *Hales vs. Pettit* (1 Plowden, 253,) furnished him part of the scene of the Grave Diggers in Hamlet. The question in the case was whether Sir James Hales had committed suicide in his lifetime, and the argument that suicide consisted of three things finds a close parallel in the argument of the clown that it has "three branches, to act, to do, and to perform." But we can not attempt an enumeration of Shakspeare's many allusions to the law. Lord Campbell's collection of them makes a volume of respectable dimensions. Burton in his *Anatomy* reckons law suits as among the most certain causes of melancholy. Churchill in his *Rosciad* tells us of lawyers,

Who in the Temple and Gray's Inn prepare,  
For clients' wretched feet the legal snare.

Addison exposes in the *Spectator* a lawyers' club, at which the members met to recount their sharp practices, the palm being awarded to the keenest trickster. Pope (assisted by Judge William Fortescue) burlesques legal ratiocination in the report of *Shadding v. Stiles*.<sup>1</sup>

Butler introduces us to lawyers,

"With books and papers placed for show  
Like nest eggs to make clients lay  
And for their false opinion pay."

Wordsworth in his *Poet's Epitaph* has his fling at the profession:

"A lawyer art thou? draw not nigh!  
Go, carry to some fitter place,  
The keenness of that practised eye,  
The hardness of that sallow face."

Southey speaks of lawyers as having Swiss consciences. Bulwer's Uncle Roland exclaims when the bar is proposed to Pisistratus Caxton: "Zounds! the bar and lying with truth and a world fresh from God before you." His Sir Peter Chillingly says: "A worm will turn, especially a worm that is put into Chancery." An allusion to the peculiarities of this tribunal also occurs in *What Will He Do With It*, where, upon being informed that the Pope was "spreading himself" and becoming dangerous, the sapient suggestion is made, "Put him into Chancery and he will never lift up his head again." De Quincy has a fling at "the lawyers who do not indulge in the luxury of too delicate a conscience." Dickens was a most inveterate enemy of English law. Almost his whole bar, Mr. Vholes, Conversation Kenge, Mr. Guppy, Mr. Jaggers, Mr.

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<sup>1</sup>His rivals in this line of legal authorship are "Decisions of Sergeant Arabin" and "Galts Cases before Justices of the Peace."

Brass, etc., deserve to be stricken from the rolls; "which erasure," says he, "has always been held in these latter times to be a great degradation and reproach and to imply the commission of some amazing villainy, as indeed would seem to be the case when so many worthless names remain among its better records unmolested." Bleak House seems to have been written for no other purpose than to vent his spleen against the Court of Chancery. How he gloats over the enormities of *Jarndyce vs. Jarndyce*, that "perennially hopeless suit." The truth is that Dickens has made himself, as well as the law, ridiculous in this work. What can surpass in bathos his interrogatory concerning Richard's case. "Would not Chancery be found rich in such precedents if they could be got from the recording angel?" Sterne represents his father as being ruined by gaining a Chancery suit and having to pay the costs. Hear Carlyle's apostrophe to Fouquier Tinville: "Remarkable Fouquier! once but as other attorneys which hunt ravenous on the earth. . . . The heavens had said, "Let there be an incarnation, not divine, of the venatory attorney spirit, which keeps its eye on the bond only; and, lo! thus was it." Paulding has chosen a law suit as the form under which to burlesque the war of 1812. Brother Johnathan's lawyer is selected like a race horse, for his wind." The speech of John Bull's advocate, however, was said to be twice as good because it was twice as long. The final adjudication by Justice Scout,<sup>1</sup> is precisely the contrary of his former opinion. "Law is one thing to-day, another thing another day, which is agreeable to the greatest and oldest law in the world—the law of nature—which on the very face of it declares that all things are subject to change." Mr. Butler, whom we have already cited, is himself among the offenders he describes. In his poem of *Two Millions*, he gives us the sentiments of Firkin, the capitalist, who hated all lawyers, but

"—was particularly hard and unforgiving  
On those so lucky as to make a living.  
Why should they thrive, (in his wise way he said it,)  
They had no capital and little credit;  
And if'twas talents helped them to their gains,  
Why then there ought to be a tax on brains!  
Besides, a weightier argument he founds—  
The virtuous censor—on high moral grounds,  
'He knew the law to be a knavish science,  
Made to demoralize ingenuous clients;  
Who ever saw a single instance yet,  
Of any debtor sneaking out of debt,

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<sup>1</sup>Sir William Scott.

By pleading usury or limitation,  
Save by a lawyer's pen and penetration?  
Who ever skulked behind the law's delay,  
Unless some shrewd attorney showed the way,  
By his superior skill got the ascendant,  
And let astray the innocent defendant?'  
'Twas touching, quite, his horror when he saw,  
How Lawyers set aside the Moral Law.  
Protesting ever, as his firm conviction,  
An honest Lawyer was a Legal Fiction!

In *Kathrina*, Holland represents himself as meeting in New York many of his college friends:

—“Here was one  
*Who stole my wood in college* and received  
With grace the kick I gave him. He had grown  
To be the tail of a portentous firm  
Of city lawyers, managed, as he said,  
The matter of collections, and had made  
In his small way, to use his modest phrase,  
Truthful as modest, quite a pretty plum.”

In his last poem, “The Ring and the Book,” Browning has chosen for his plot an old Italian criminal trial. This gives abundant opportunities to ridicule the law, which are not neglected. The logomachy of the pleaders is thus presented:

“Hear my new reasons,” interposed the first,  
“Coupled with more of mine,” pursued his peer—  
“Besides the precedents, the authorities”  
From both at once a cry with an echo, that!  
That was a fire-brand at each fox's tail  
Unleashed in a cornfield: soon spread flare enough,  
As hurtled thither and there heaped themselves  
From earth's four corners, all authority  
And precedent. \* \* \* \*  
And always once again the case postponed.”

Among the “British public,” whom the poet continually addresses as “ye who like me not,” the lawyers are likely to remain, since their calling is thus sneered at:

“Law, the recognized machine,  
Elaborate display of pipe and wheel,  
Framed to unchoak, pump up and pour apace  
Truth in a flowery foam shall wash the world—  
The patent truth-extracting process—ha!”

Of the last pleader in the case, we have this description:

“Pompilius patron by the chance of the hour,  
To-morrow her persecutor—composite he,

As becomes one who must meet such various calls—  
 A man of ready smile and facile tear,  
 Improvised hopes, despairs at nod and beck,  
 And language—oh! the gift of eloquence!  
 Language that goes as easy as a glove  
 O'er good and evil, smoothens both to one."

After the "dolts and fools who make up reasonless unreasoning Rome" had been for a long time divided—half and half—in opinion concerning the murder:

"Now for the trial," they roar: "the trial to test  
 The truth, weigh husband and weigh wife alike  
 I' the scales of the law, make one scale kick the beam!"

Whereupon the poet tells "the simpletons" that "law is competent to no such feat." The orations of Hyacinthus de Archangelis (for Count Guido) and of Johannes-Baptista Bottinius are ludicrously interlarded with Latin—"Cicero-ized." The latter confesses to no higher motive in his prosecution of the unnatural murder than, "Still, it pays."

The "Comic Blackstone," by Gilbert Abbott A. Beckett, embodies not a few of the charges already quoted. The author agrees with the learned Sir William in his opinion that every gentleman should know a little of the law; adding, "and, perhaps, say we, the less the better." The jurisdiction of Chancery over lunatics is explained upon the ground that it drives people mad. And the undue respect paid to the letter of the law is satirized in the report of the execution of a physician who humanely bled a patient in the streets and thus became obnoxious to the penal statute against shedding blood upon the highway. But if one would see all the accusations quoted against the profession multiplied and intensified—if he would see the law represented as "the sum of all villainies"—let him turn to the "Pleader's Guide." The lectures therein delivered to Mr. Job Surrebutter, counsel the commission of every offence known to the moral law. The young aspirant for legal spoils is advised:

"To puzzle e'en by explanation,  
 To darken by elucidation,"

to appropriate money collected for his clients, to confound witnesses, to wrangle with his adversary, to abuse the opposite party, to bootlick the attorneys, etc. Two pictures in a word illustrate the policy inculcated. In the first, the plaintiff has hold upon the horns of the cow, whose ownership is disputed, the defendant upon the tail, while the lawyer is busy milking: in the second, we see him

driving the animal from the scene, the rival claimants being too much engrossed in a fisticuff encounter to notice the disappearance of the prize.

It is safe to assert that there is no subject about which more jests are current than the law. "Lawyer's houses are built on fool's heads" runs the proverb. One day a simple farmer, who had just buried a rich relation, an attorney, was complaining of the great expense of a funeral cavalcade in the country. "Why, do you bury your attorneys here?" asked Foote. "Yes, to be sure we do: how else?" "Oh, we never do that in London;" No?" said the other, much surprised, "how do you manage, then?" "Why, when the patient happens to die, we lay him out in a room over night by himself, lock the door, throw open the window, and in the morning he is gone." "Indeed!" exclaimed the farmer, with amazement, "what becomes of him?" "Why, that we can not exactly tell; all we know is, *there's a strong smell of brimstone in the room the next morning.*" A gentleman once accosted Baron O'Grady, and asked him if he had heard of his son's robbery. "What!" said the baron, "Your son who is a lawyer? Pray, *whom did he rob?*" A gentleman leaving the company, somebody who sat next to Dr. Johnson asked who he was. "I can not exactly tell you, sir," replied the doctor, "and I should be loth to speak ill of any person whom I do not know deserves it, but I am afraid he is an *attorney.*"

Among the barbarous and ignorant, the prejudice against lawyers has always been bitter. Gibbon informs us that in the invasion of Rome, a vandal who cut out a lawyer's tongue remarked with serene complacency that he had stopped one viper from hissing. In his history of Peru, Prescott narrates that when a colony of Spaniards was forming for the occupation of that country, one of the first regulations passed was that no lawyer should be among the number. Shakspeare represents the insurgents in the rebellions of Tyler and Jack Cade as being specially rancorous against the lawyers. So violent was the hatred of them during the commonwealth, that not one was appointed on the committees for reforming the law. In Turkey the punishment of lawyers is unique—they are pounded to death in a mortar. In Goethe's *Goetz von Berlichingen*, Olearius, the jurisconsult, congratulates himself on his escape from the mob at Frankfort. In the judicial history of our new territories, we find frequent enactments against the legal fraternity. "Lower Union District, Revision of March, 1861, Resolved, that no lawyer

shall be permitted to practice law in any court in this district, under penalty of not more than fifty nor less than twenty lashes and be banished from the district." "Trail Creek District, Aug. 20th, 1860. No lawyer, attorney, counsellor, or pettifogger, shall be allowed to plead in any case or before any judge or jury in this district." The idea that the presence of lawyers is incompatible with an ideal state of society, seems to have been entertained by Sir Thomas More. They were rigidly excluded from Utopia. The same idea finds a voice in the following advertisement copied by Mark Lemon into his inimitable Jest Book. "For sale, A large landed estate in Hertfordshire, with beautiful park, etc. N. B. There is not an attorney within fifteen miles of the neighborhood." To this description, the "late lamented" of Punch has significantly given the title of *Arcadia*.

In the quotation of abuse directed against the law, our only difficulty has been to select from the materials at hand. We did not propose to reply to these foolish accusations. Some of them are designed as burlesque and nothing more; many of them are referable, of course, to ignorance. Indeed, the laity have always committed the grossest mistakes in their representations of the bar. Miss Edgeworth, for instance, makes one of her heroes, a young lawyer, achieve his reputation by bringing forward a point which was decisive of the case and which the senior counsel in his speech had entirely overlooked, an incident that could not possibly happen, as the junior never has the conclusion. The same reckless disregard of reality has ever characterized the treatment which the bar has received from the uninitiated. Their charges, then, do not deserve the compliment of refutation. Indeed, the world has furnished a practical refutation of them by giving to the profession its highest interests in trust. Another practical refutation is the success at the bar of such a man as Sir Samuel Romilly, whom Thomas Erskine May, in his Constitutional History of England, an historian as cautious as his predecessor Hallam, styles "the best and purest of public men."

We shall, in conclusion, cite Mr. Butler's explanation of the sharp contradiction between the prejudices so freely uttered against the bar and the real trust reposed in its essential integrity, good faith and fair dealing:

"There are bad men in every calling, and more of them, probably, in the law than in the other learned professions, because of its ampler opportunities and readier means for misdoing; and, accord-

ing to the custom of men, the worse specimens are those most generally accepted as types of the class, as if, by a perversion of a familiar rule, an implied warranty existed that the whole profession correspond with the damaged sample.

But, besides this usage, which applies equally to every other profession, and enables those who will, to visit on all physicians the reproach of the mal-practice of a few, and on all clergymen the scandals and follies of some, and on all Christian men and women the inconsistencies and faults of their fellows, there is another reason why our profession, which is the vehicle and engine of opposing interests, should, as it moves along its track, be covered with this perpetual dust of censure and detraction. The law is the most positive of sciences, and the most vigorous of human forces. In its practical application to the affairs of men, it is perpetually compelling an unwilling submission to its demands. It makes men give up property which they want to keep, to pay debts which they prefer to owe or to avoid, and to perform obligations which they seek to break. It is perpetually dealing its blows and driving its bolts in the attack or support of some interest of person, or property, or public, or social order. Those who practice it as a profession are necessarily placed in an attitude of perpetual antagonism to members or classes of the community, to individuals or bodies of men. It must, therefore, need be that offences come; and the profession, as a class, has often to assume the defensive against criticism and attack and to re-assert the principles by which its action is guided and governed."

WALTER B. HILL.

Macon, Ga.

## THE RULE IN SHELLEY'S CASE.

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About one-half of the States have abolished wholly or in part this famous rule. It is proposed to examine briefly in this article; what the rule is; what are the reasons and policy for it, and whether or not it should be restored.

### 1. What is the Rule in Shelley's Case?

To answer this question intelligently, and not in a set form of words extracted from the books which would impress the memory only, it is proper to inquire into the elements of that class of estates with which the rule is intimately connected, or rather which constitute its antithesis, viz: Contingent Remainders.

Previous to the statutes which dispense with livery of seisin, and thus modify the common law in regard to the creation and determination of freehold estates, all future estates were either Remainders or Reversions. A Remainder is the remnant of a gift after a *preceeding part*, (frequently called *particula* or *small part*, with reference to the whole), of the *same gift has been disposed of*. The term, which is a relative one, has reference to the *whole gift*, and not to the interest which may yet remain in the grantor, which last, is called a Reversion, because after the end of the particular estate, the land will revert or return to the grantor: *Minor's Synopsis of Real Prop. "Remainders."*

Remainders are either vested or contingent. A contingent Remainder is one limited to an uncertain person, or on an uncertain event, or *so limited* to a certain person and on a certain event as *not to possess a present capacity to take effect in possession* should the possession become vacant. Its most marked characteristic is the want of a present capacity to take effect in possession should the possession become vacant; as of a Vested Remainder, the most marked characteristic is the presence of such capacity: *Idem.*

There are four classes of contingent remainders, according to Mr. Fearn.

1. Where the remainder depends entirely on a contingent determination of the particular estate itself; e. g., grant to A. until B. returns from abroad, remainder to Z. 2. Where the contingency on which the remainder is to take effect, is independent of the de-

termination of the particular estate; e. g., lease for life to A. B. and C., and if B. survive C., remainder to B. and his heirs. 3. When the person to take is certain, and the contingency on which it is limited is certain, but it may not happen during the continuance of the particular estate, or *eo instanti*, that it determines, e. g. lease to A. for life remainder after B.'s death, to C. and his heirs. There is an exception to this class, when there is a mere constructive possibility that the event will not happen during the continuance of the particular estate, e. g., where the lease is to A. for eighty years, remainder *after A.'s death* to B. and his heirs. Here there is so little probability of A.'s out-living the eighty years (so as to create a hiatus between the particular estate and the remainder over, and thus defeat it,) that the remainder is considered vested. 4. Where the remainder is limited to a person not ascertained or not in being, e. g., lease or grant, to A. for life remainder to the heirs of B., (if the estate after the death of A. had been limited to the heirs of the grantor, it would not have been a remainder, but a reversion.)

To this class there are two exceptions: First, when to the word "heirs," some descriptive phrase is annexed to show that the word is not used in its technical and proper sense, as if the phrase "now living" had been annexed to the words "heirs of B." in the last example; and second: **WHEN AN ESTATE OF FREEHOLD IS LIMITED TO AN ANCESTOR AND AFTERWARDS IN THE SAME CONVEYANCE A REMAINDER IS LIMITED MEDIATELY OR IMMEDIATELY TO HIS HEIRS OR THE HEIRS OF HIS BODY.**

In such cases the words "heirs," and "heirs of his body," are not to be construed as creating a contingent remainder in the heirs, etc., but as words of limitation, *vesting the fee in the ancestor*, e. g., grant to A. for life, remainder to B. for life, remainder to A.'s heirs, (or the heirs of his body.) A. takes the fee subject, however, to be opened to let in B.'s life estate (which is not merged), should he survive A.

This is the celebrated rule in Shelley's Case. The famous doctrine is as old as 18 Edw. II., Year Book, fol. 577, translated in 7 Man. & Grang., 944, n (c), though Shelley's case did not occur until in the reign of Elizabeth, and it is as much a part of the common law as its twin brother rule that when an ancestor devises to his heirs the same estate they would take as heirs, they shall be considered as taking by descent, and not by purchase. See Williams on Real Property, 244-5, where a very clear view of the origin of the rule is given. In regard to the rule three things should be

noted: First, The ancestor's estate must be at least a freehold, but not necessarily for his life; it may be *pur auter vie*, upon joint lives, *durante viduitate*, an estate tail, etc. Second, the limitation to the ancestor and the heirs must be by the same instrument. And, third, it makes no difference whether the remainder be limited mediately or immediately to the heirs of the ancestor, except that in the former case, as in the above example, the limitation to the ancestor unites with that to the heirs only *sub modo*, and they open, if necessary, to let in the intervening estate. Fearne Cont'g. Rem. m. pp. 42-3. *Lewis Bowles Case*, 11 Co., 79, Williams Real Prop., 250.

The rule applies, though there is a possibility of the ancestor's estate determining in his life time, as when a lease is to A. and B. for their joint lives, remainder to C. for life, remainder to A.'s heirs. Fearne Cont'g. Rem., 37-8. So, where there is a joint limitation of the freehold to several persons followed by a joint limitation to the heirs of those persons. *Id.* 40. So, where the ancestor takes a freehold by implication, *Id.* 49, *Pibus vs. Mitford*, 1 Ventris, 372. So, it applies to powers of appointment; Fearne, 102, Preston's Essay on the Rule, 57. To equitable, as well as to legal estates, Fearne 68, 78, and to wills as well as to deeds. See authorities collected in 2, Tho. Co. Lit., 172, note, (p. 3.)

Whether the manifest particular intention of a testator to confine the first taker to a life estate and prevent him from disposing of the fee should be thwarted by the application of the rule, was elaborately discussed in the also famous case of *Perrin vs. Blake*, 4 Burrow, 25-79, 1 Bl. Rep. 672; Dougl. 329; 1 Hargr. Law Tracts, 490. The Court of Kings Bench, Justice Yates dissenting, adjudged that the ancestor took only a life estate with contingent remainder in the heirs as purchasers, but upon a writ of error to the Exchequer Chamber, the judgment was reversed by the opinion of seven judges to one. An appeal was taken to the House of Lords, but the parties compromised and a *non pros* was entered. Although this case partially broke the long line of adjudications, and, for awhile, unsettled the law, yet it gave rise to those splendid essays of Hargrave, Fearne, Preston and Butler, in which the merits of the rule as a canon of real property were thoroughly tested, and every conceivable objection discussed.

The rule does not apply when the ancestor's estate is vested in him as trustee, and the limitation to the heirs is for their own benefit; Fearne 40, 68, and 78. Nor when there is a successive freehold to several, and a joint limitation to the heirs of their bodies, *Id.*,

41. Nor when the limitation is to the wife for life, remainder to the heirs of the husband and wife, *Id.*, 44. Nor when the ancestor's freehold is legal, and the remainder equitable, and *vice versa.*, *Id.*, 68, 78. Nor when words heirs and heirs of the body are not used technically, but in a peculiar or confined sense not according their legal import. See for illustrations Fearne Con'g. Rem., m-pp. 108, 110; 229, 236; 246, 252; 2 Tho. Co. Lit., 176; (note p. 3.) Nor when the limitation to the ancestor and to the heirs are by different instruments, Fearne 31; Douglass' Rep. 508. But a will and schedule, and a will and codicils, are considered as one instrument; 2 Wm. Blackst. Rep., 698; Rawle's note to Williams Real Prop., 246.

An examination of the cases, where it does not apply, will show that the plain terms of the rule are not complied with. As Sir William Blackstone, in delivering his elaborate opinion in the Exchequer Chamber, reversing the King's Bench in *Perrin vs. Blake*, says: All those cases that had occurred from the statute of wills to that time, (over 200 years), in which heirs of the body had been construed to be words of purchase, were reducible to these four heads—either where no estate of freehold was given to the ancestor, or where no estate of inheritance was given to the heir, or where other explanatory words were immediately subjoined to the former, or lastly, where a new inheritance was grafted on the heirs of the body—none of which was the case upon which he was then speaking: Hargr. Law Tracts, 507. And, says Mr. Hargrave the most lucid expounder of the rule, when it is once settled that the donor or testator has used words of inheritance according to their legal import; has employed them intentionally to compromise the whole line of heirs to the tenant for life, and has really made him the terminus or ancestor by reference to whom the succession is to be regulated; then it will appear that, being considered according to those rules of policy from which it originated, it is perfectly immaterial whether the testator (or donor) meant to avoid the rule or not; and that to apply it, and to declare the words of inheritance to be words of limitation, vesting the inheritance in the tenant for life, as the ancestor and terminus to the heirs, is a mere matter of course. That, on the other hand, if the words of inheritance were not used in their full and proper sense, so as to include the whole inheritable blood, and make the tenant for life the ancestor, or terminus for the heirs, but the testator intended to use the word heirs in a limited, restrictive, untechnical sense, and to point at such individual person

as should be the heir, etc., of the tenant for life, at his decease; and to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the ground-work for a succession of heirs; and constitute him or her, the ancestor terminus and stock for the succession, to take its course from; in every one of these cases the premises are wanting upon which only the rule in *Shelby's* case interposes its authority, and that rule becomes quite extraneous matter. So, then, in order, to ascertain, in every case, whether or not the rule is applicable, the inquiry simply is, in what sense did the testator or donor use the words. If in the former sense, the rule always applies, notwithstanding a positive declaration, that it shall not. If in the latter sense, the rule is as invariably foreign to the case; the remainder is contingent until the death of the tenant for life, and the party named as heir takes by purchase: 1 Hargr. Law Tracts, 575, 577.

This view of the rule has been generally accepted and approved by the highest authorities, and, as Mr. Thomas, the learned editor of *Coke upon Littleton*, says: It is to be admired for its simplicity and clearness: 2 Tho. Co. Lit. 168, note, (P. end). The rule is held not to apply to executory trusts, including executory marriage settlements. These cases being absolutely in the discretion of the Courts of Chancery, which may model the *future* conveyances as they deem best: 2 Washb. Real Prop. m-p., 271, and authorities cited. In the Chancery case of *Bagshaw vs. Spencer*, 1 Ves., 1421, Lord Hardwicke held the rule not to apply to *any* trust estate. This was in direct conflict with the King's Bench case of *Coulson vs. Coulson*, 2 Atk., Rep. 246, where the rule was held to apply to all *executed* trusts—the distinction between which and executory trusts, Lord Hardwicke ignored, in order to evade *Coulson vs. Coulson*; but the distinction has been clearly maintained, and he has been overruled by Lords Northington and Thurlow, Eden 119; 1 Bro., 206, and by subsequent cases.

## 2. What are the reasons and policy of the Rule?

The first reason usually given is, that if the heir took as purchaser and not by descent, the lord of the fee would have been deprived of the fruits of his seignory—the wardship and marriage of the heir. A very weighty reason in feudal times, but one which passed away with the burdensome incidents of tenure, and not insisted upon for preserving the rule.

A second reason is, if the heir takes the remainder as purchaser it would, of course, be contingent until the death of the ancestor,

*nam nemo est hæres viventis*; consequently, the inheritance would be in abeyance during the life of the ancestor, a result always deprecated in the law and avoided as much as possible. This is a weighty reason affecting the public, and should be set-off only by a very considerable private benefit to be derived from the abolition of the rule.

A third reason resulting from the last one is, that if the heir takes, as contingent remainder-man and not by descent, there could be no regular alienation of the fee during the life of the ancestor.

A clog would thus be put upon the circulation of property, and a limited kind of the obnoxious estate-tail created, which could not be barred except by some such bold step as was taken by the judges in 12 Edw., IV., or by express legislation.

Mr. Fearne's remarks are very appropriate here. He says: The construction adopted by the Court of King's Bench in the case of *Perrin vs. Blake*, so far from *unlocking* property, (as it was observed it would, in the argument of that case), really ties it up for a longer period, and imposes a more *strict clog* upon it than the limitations commonly used in marriage settlements; for, in such settlements, the first son that attains the age of twenty-one years may, with the consent and concurrence of his father, by suffering a recovery, unfetter the estate, and make a new settlement upon his marriage or other desirable occasion; but it is quite otherwise if the heir takes the remainder as purchaser. The inheritance must remain suspended during the father's life; and though he should have half a score of children, yet, should he live to an old age, and survive them, the estate can not vest in any of them, (much less be sold), but may, perhaps, become the property of some remote remainder-man, whose name, probably, was inserted in the will only to wind up the general round of limitations. Such a construction, if once fully established would open an almost unlimited power to the judge of distators, and directing the *circulation* of , I take it, is the only sense in which / *clog* upon the circulation of property :

lied upon by Mr. Hargrave is, that the ase, is part of an ancient policy of the ecreation of estates of inheritance with rictions foreign to their nature, and to etion between the acquisition of a title and to prevent the former from being nts, and disguised with the qualities of

the latter, whereby the estate would become a *compound of descent and purchase—an amphibious species of inheritance, or freehold with unlimited succession to the heirs without the other properties of inheritance*: Hargr. Law Tracts, 489, 551.

3. Ought the rule to be restored, or entirely abolished?

The reasons above given for the rule, except the first, are as applicable in this country, at the present day, as they were in England when the doctrine originated. Indeed, the policy of our laws favoring, as it does, unfettered inheritances, free alienation of property, and the holding liable of heirs for their ancestors' debts upon principles of equity, ought to make them apply with greater force.

There is but one argument for its abolition really worthy of consideration, and this has been confined to devises, as to which some of the States have abolished the rule, leaving it in force as to gifts and grants.

The Court of King's Bench in *Perrin vs. Blake*, laid it down as a principle, that the intention of the testator should be the sole rule for construing his will, and should control the legal import of the words. Mr. Fearne makes an answer to this in a manner which leaves no room to doubt its conclusiveness.

It may be summed up in this extract: "Whenever the construction upon the apparent intent of the testator, is not contrary to the construction upon certain established legal maxims, respecting the import of terms made use of by him, so far let the apparent intent be the guide in the construction, but not one jot further:" Cont'g. Rem. m.pp., 267-8-9. But as the statute which abolishes the rule thereby declares what shall be the construction, this answer loses its force, and the question still recurs, which of the two constructions is preferable.

It may be observed, in the first place, that the rule is the common law, and a respect for its wisdom—that perfection of reason which Lord Coke says it is—seems to require that the rule should not be abrogated, unless it can be shown that it owes its existence solely to the odious and burdensome Feudal system of the dark ages, and, as a relic of that system, subserves no good at the present time. It has been remarked, by an eminent Professor, that it is dangerous to tamper with the principles of the common law, even when the reasons for them can not be seen; that, although an existing evil may be remedied, yet the operation of the new law is almost sure to create a greater one when tested by a very brief experience. It is, indeed, too often the resort of political legislatures

to cut the Gordian knot of legal difficulties, which they can not, or do not wish to take the trouble to untie. The reasons for repealing the common law, when not at variance with our institutions and system of government, should be both clear and strong, and it should be certain that no evils, of even as great a nature as those proposed to be remedied, will be entailed by the statute. It may be objected that, unless it appears that some good results from its preservation, the rule ought to be abolished, because there is too much learning on the subject—too many fine drawn distinctions, and too much time wasted in discussions, which may be cut short by a five line statute. But then it should be remembered that the learning, the distinctions and the discussion, are matters of the past; that they but served, in their results, so far as we are now concerned, to accurately and plainly define the rule, to thoroughly test it, to show its merits, to confine it within its proper limits, and to answer objections.

But to return to the principal objection, that the rule disappoints the particular intention of the grantor or testator—one answer is, that if it is once understood that the rule will be firmly adhered to the attempt to run counter to it will not be made, and there will be no particular intention to violate. The answer specially relied upon, however, is, that it is *the policy of the law* not to allow a grantor to make such a deed, or a testator such a will, as will invest the first taker with a freehold, and his heirs with an estate in fee by way of contingent remainders as purchasers, as may be deduced from the reasons given above; and if such an estate is attempted to be created the law will defeat it, let the intention be ever so plainly manifested. Is it not the policy of the law of this country, at this time, that inheritances should be vested, not in abeyance? That alienation should be favored, not restrained? That the properties and incidents of estates in fee should be preserved—the widow given her dower and the husband his curtesy? That creditors should not be deprived of their extents for just debts by the death of the life tenant, when the *purchasers* of the estate are his natural *heirs*, and pay nothing for their *remainders*?

The preservation of the rule answers these questions in the affirmative; its abolition, in the negative. Can there be any doubt as to how the third inquiry of this article should be answered?

Chancellor Kent says the abolition of the rule will facilitate family settlements, and he gives no other reason for abolishing it. So it will, but such settlements have never been favored in this coun-

try since the rule of primogeniture was abolished. They are contrary to the policy of our laws, and are very rare. If not mistaken, it was through his influence that New York set the example, which has been followed by so many of the States, of abolishing this famous rule, and though his eloquent requiem has doubtless been read by many, the temptation to insert it here can not be resisted.

“The judicial scholar, on whom his great master, Coke, has bestowed some portion of the ‘gladsome light of jurisprudence,’ will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning, devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu for ever to the renowned discussions in Shelley’s case, which were so vehement and so protracted as to rouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skilful criticism and refined distinctions, which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in *Perrin vs. Blake*, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone’s illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat and orderly abridgement of Cruise, and the severe and piercing criticisms of Reeve. What I have, therefore, written on this subject may be considered, so far as my native State is concerned, as an humble monument to the memory of departed learning:” 4 Com., 233. Note (a).

By way of contrast, and in conclusion, the following extract—from the opinion of the late Chief Justice Gibson, of Pennsylvania, in *Hillman vs. Bonslaugh*, 1 Harris, 351—is made.

“The rule ill deserves the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. It is part of a system; an artificial one, it is true, but still a system, and a complete one. The use of it, while fiefs were predominant, was to secure the fruits of the tenure, by preventing the ancestor from passing the estate to the heir, as a purchaser, through a chasm in the descent, disemcum-

bered of the burdens incident to it as an inheritance; but Mr. Hargrave, Mr. Justice Blackstone, Mr. Fearne, Chief Baron Gilbert, Lord Chancellor Parker, and Lord Mansfield, ascribe to it concomitant objects of more or less value at this day; among them, the unfettering of estates, by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it would otherwise be. However that may be, *it happily falls in with the current of our policy.* By turning a limitation for life, with remainder to heirs of the body into an estate tail, *it is the handmaid not only of Tallanum's case, but of our statute for barring entails* by a deed acknowledged in court; and where the limitation is to the heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. In a masterly disquisition on the principles of expounding dispositions of real estate, Mr. Hayes, who had sounded the profoundest depths of the subject, is by no means clear that the rule ought to be abolished, even by the legislature; and Mr. Hargrave shows, in one of his tracts, that to engraft purchase on descent, would produce an amphibious species of inheritance, and confound a settled distinction in the law of estates. A donor is no more competent to make tenancy for life a source of inheritable succession, than he is competent to create a perpetuity or a new canon of descent. The rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property."

EDMUND S. MALLORY.

Jackson, Tenn.

# MODERN THEORIES OF GOVERNMENT.<sup>1</sup>

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## NUMBER ONE.

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*"Je le dirai toujours, c'est la moderation qui gouverne les hommes et non pas les excès." Montesquieu, Esprit des Lois. L. xxii. c. 22.*

*"A revolution is always the fault of the Government, never of the people." Goethe.*

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Modern Geologists are agreed that nothing is so unstable as the surface of our (so-called) "firm-fixed earth." The solid crust on which we tread with so much confidence, and which we have been taught to believe coeval at least with our race, is in a continuous state of oscillation; now rising by a slow and gradual elevation, now sinking by a similarly progressive depression; now lifted by subterranean throes that shake to atoms the "insubstantial pageants" of human greatness, and, anon, settling in its unstable bed until the waters of the ocean roll over the habitations of man. Even when gradual, these changes, in the course of countless ages, modify the seasons, the flora, the animated life of the surface affected. At one period, the polar ice and the grizzly bear descend from the Arctic Circle to the confines of the Torrid Zone, and enormous glaciers plough their way and sow their moraines where subsequently wave the olive and the vine. The Saurian and Megatherian give place to the fossil Mastodon and Elephant, and, they, in turn, yield to the existing fauna. The Tiber is no

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<sup>1</sup> This article, and succeeding articles under the same title, will be compiled from notes made in Europe in the year 1863, during a course of political readings resorted to, to relieve the tedium of exile. They may be considered as a review of the writings and theories of some of the leading writers on government—such as De Lolme, Sismondi, and De Tocqueville. The theme is, perhaps, not so foreign to the student of law as to be deemed inappropriate to the objects of this REVIEW. In this country, more than any other, owing to the constitutional basis of our general and state governments, the law is blended more or less with politics, and it behooves the lawyer to make himself familiar with the principles that underlie all governments. If these memoranda shall be found of any service to the younger members of the profession, the space they occupy will not be entirely lost, and the writer will be amply rewarded.

longer frozen over as in the days of the early Romans, and the inhospitable clime of the Ultima Thule is now tempered by the warm breath of the Gulf Stream. The incessant changes of the outer world are not confined to inanimate nature or the lower forms of animal life. The Finn and the Esquimaux retire before the Celt and Algonquin, and they subsequently yield to the Teuton and the Anglo-Saxon. Distinct races of men, like the lower orders of mammalia, have their rise, progress, and decline. The builder of the Pyramids becomes the naked Copt; the worshipper at the Temple of Solomon sells old clothes in all the marts of commerce; the "noble old Roman" begs paolis in the very streets of the "eternal city;" and the flexible Greek, if he retains the fickleness of Alcibiades, has lost the song of Homer, the pencil of Apelles, the chisel of Praxitelles, and the tongue of Pericles. High civilization, when attained, seems to be confined to a limited race, and a narrow circle of territory. Can we anticipate its incessant progress, or even its permanent continuance? Have we any assurance that the next wave of life may not overwhelm western civilization in a Cossack ocean? A few degrees increase of temperature and the energy of the now dominant races might degenerate into the listless apathy of the Moor or the Hindoo. A few degrees less of heat, and the large brain of the Caucasian might dwindle into the contracted cranium of the Lapp. The profoundest modern seekers into the mystery of existence seem to have come to the conclusion that all life is intimately connected, and sprung from the same germ. Is it possible, as one learned ethnographer<sup>1</sup> suggests, that the progress of animate nature is not always forward, but sometimes backwards, and, that as we have ascended from the monad, we may, by a natural retrogression, return to the same starting point? The Slave, says this writer, nature's last form of humanity, is a woful descent from the old Hellenic type!

In the present state of our knowledge of the past, outside of all theoretical reasoning and all hopes founded on revelation, the fears aroused by these interrogatories seem to be purely gratuitous. The solid earth has oscillated, but each new development of life has certainly been from a lower to a higher type. So, too, notwithstanding the degeneracy of particular races, the progress of humanity has been upwards and onward. The oscillations of the human world may be as startling and fearful as those of our mother earth; they may shake to fragments all our most cherished institutions,

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<sup>1</sup>Knox.

and overwhelm the civilization of ages in one wild wave of revolution; but, if our experience from the past affords any criterion from which to draw deductions for the future, the new creation from the ashes of the old will rise with a purer life, and a fresher vigor.

It is not alone as individuals, but in their collective capacity as nations, that human progress has been marked. Nature, in fact, acts upon the mass even when she seems to confine her gifts to individuals. The morals and manners of a people are far more important than their laws and forms of government. The latter may be the work of a day and a particular ruler; the former are always the growth of time and place, and are the collective representatives of the civilization of the mass. The real prosperity and happiness of a nation are dependent less on the one than on the other. Men have been slow to find out this fact, and have, therefore, laid much more stress on outward forms than they deserved. The violent disputes between philosophers as to the best form of government have turned out to be quarrels about words not facts. It is not the form of a government, but its aim and object as directed by the manners and morals of the whole nation, which constitute its essential elements. England has had substantially the same form of government for nearly a thousand years, and yet she has gone through every phase from a pure despotism, where the voice of the Sovereign was all powerful, to that of a republic where the voice of the people is the controlling element. It may safely be said that, although the forms may be the same, the object and aim of the government of all civilized nations are very different now from what they were in former times. In the old world, nay, we may say in the whole world, until a very recent date, the principal aim of every government was so to wield its strength as to enable it the better to aggress on its neighbors. War was the normal condition of the human race, and conquest the main object of every people. Subsidiary to this primary aim, the pandering to the worst passions of the populace by largesses and public amusements, the luxury of an aristocracy, or the glory of a monarch were the ends had in view, according as the popular, aristocratic, or monarchical element prevailed. Now, the happiness and progressive improvement of the whole people are the acknowledged aim of all political institutions. Even in the most despotic countries, the prosperity of the public is kept in view, the success of the government depending upon the extent to which this end can be attained. The Czar of all the Russians is subject to this modern rule of policy, if not to

so great an extent, yet as certainly as the Congress of the United States. The Emperor of France and the aristocracy of England govern by this rule. The throne of the one and the power of the other depend upon their substantial conformity with its requirements. Whatever may be the form of government, therefore, or the means resorted to by the ruling power of different nations to effect the object—the aim is the same. “All the political theories,” says Sismondi (*Etudes Sur les Constitutions des Peuples Libres*), “which are avowed now-a-days, all those which any one dares to promulgate, are founded upon the beneficent and generous feelings of humanity. The partisan of this or that political theory looks only to the general benefit, and urges his views upon the ground that they ensure greater advantages to the largest number of human beings.” Upon this ground, as the same author well suggests, all the different systems of government may be sustained in good faith, and by honest and disinterested partisans. Instead of abusing each other, the advocates of these systems should rather remember that they are students of the same great theme, animated by the same lofty desire, and seeking the same profound truth. They may, perhaps, mutually enlighten each other by their opposing schemes, their sagacious suggestions, and their independent deductions.

A person raised up under one set of political institutions, with his attention directed only to their particular operation, when he sees how admirably they work, is apt to think that the same institutions would do equally as well everywhere else. And, if he is fortunate enough to live under a free government, he may feel surprised that other nations do not at once avail themselves of the advantages, as they seem to him, of free institutions. The Englishman is at a loss to understand how the French can submit to a government which interferes so largely with the freedom of individual action. The American, again, while he acknowledges the protection afforded to life, liberty and property by English institutions, can with difficulty conceive how the English people can tolerate the forms of royalty and the sway of a “bloated aristocracy.” One great advantage of travelling is the enlargement and correction of our ideas on such subjects. We soon find that human nature, although substantially the same all over the world, is largely modified by race, climate, location and circumstances; that you can not make a particular people conform to institutions, but must adapt institutions to the morals, manners, and prejudices of the people. The revolution of 1640 in England did not effect in the least the aristo-

cratic element of the nation. Nor did the French revolution of 1789 alter the character of the people one jot in reference to the power of self government. Any form of government forced suddenly upon England would tend to an aristocracy. Any change of form in France leads inevitably to despotism. You can not eradicate in a day instincts which are the growth of a thousand years. Changes may be wrought—are wrought in any nation—but gradually. The enlightened traveller soon learns to appreciate these facts, and then it becomes a most interesting study to see the merits and defects of each particular system in its actual workings. He will find, if I mistake not, that nature in its operation upon masses, as upon individuals, is compensatory. If there are defects in every system, there are also compensating advantages. Such a traveller was Mr. Jefferson, and he never exhibited profounder sagacity and more thorough good sense than when he advised the leaders in the first French revolution to retain hereditary monarchy as a part of the proposed new government. No man had a higher sense of what the philosophers of the eighteenth century called the “rights of man,” than the great American Democrat, and no one was more anxious to see the principles deduced from those rights carried into practical operation wherever it could be done with safety. But he was too sagacious an observer not to see that the French by nature, or by immemorial usage, are reverencers of authority, and need a permanent head to ensure public quiet. His advice, therefore, to Lafayette and his friends was to be content with the extension of the elective franchise, representative legislation, free press and the habeas corpus. Other things, he said very truly, would come when the people were ripe for them—and to grasp at more would endanger the whole. Every person who undertakes to criticise foreign governments, should have a modicum, at least, of Mr. Jefferson’s impartiality, even if deficient in his sagacity.

The civil war in America has had a tendency to direct the attention of thinking men to a more careful study of the form of government under which it has occurred. Heretofore, its friends have seen few or no defects in the complicated machinery, and have been eulogists rather than enlightened critics, while its opponents have concurred in treating it as a mere experiment, wonderfully favored by a concurrence of circumstances. Both friends and foes have been inclined to trace the existing conflict to the peculiar institutions of the country. But while concurring in this common view, they differ radically as to the defective element of the machinery.

Far the larger number have fixed upon universal suffrage as the worst element. Others, however, have attributed it rather to the frequency of elections than to the mode of election. The supposed "irrepressible conflict" between free and slave labor, has had numerous advocates, and the quadrennial convulsions of our Presidential elections have been found to be the efficient cause by not a few. Profounder thinkers have long since predicted the result—not as dependent on any single cause—but as the inevitable climax of a multiplicity of causes, such as climate, extent of territory, difference in domestic institutions, antagonism of local interests. Differing as I do from most of my own fellow-countrymen in thinking that our form of government has had nothing to do with the conflict—that it was inevitable under any form of government—my attention, in the absence of any serious employment, has been naturally directed to the consideration of the subject in its broader aspects. The study of the constitutional forms of government, and of their practical workings seemed a necessary preliminary to the formation of a reliable opinion, and the tedium of exile has been pleasantly, if not profitably, lessened by readings in that view. My acquaintance with Montesquieu, DeTocqueville, DeLolme and Jefferson was renewed. The worldly wisdom of Machiavelli was consulted. Sismondi, Mills, Brougham, Fischel and Francheville were read. In addition, the great events which have been transpiring during the last two years, were daily gleaned from the public journals, and the various comments of all factions considered and weighed. In the brief period mentioned, Poland has been almost, and Circassia entirely, exterminated, Denmark has been conquered and partitioned, an Empire has been commenced on the North American continent, a Holy Alliance of Sovereigns once more formed for the repression of struggling nationalities and free institutions, and England has abdicated her place among the nations of Europe to devote herself to the accumulation of the almighty dollar. The times have been full of incident, and afforded a rich feast for the curious thinker. My notes and memoranda would be incomplete without containing the result of my readings and observations. For this purpose, I have thrown together my notes on the three forms of government which stand as types of modern civilization—those of France, England and America. They constitute, in fact, the salient points into which political institutions are grouped under the influence of modern civilization.

The difficulty of distinctly defining different forms of govern-

ment will be more apparent when we see how very diversely great writers have written even of primary divisions. "All States, all Sovereignities," writes Machiavelli, in the Prince, "which have, or which have had authority over men, have been and are either Republics or Principalities." That is, as his treatise shows, either states where the people or a class of the people have ruled, or states ruled by hereditary princes, and he distinguishes between those of the latter which have been ruled for a long time by the same family, and those recently acquired by a Prince. "There are three kinds of government," says Montesquieu, (*Esprit des Loix. Liv. ii. c. i*), "the Republican, the Monarchical and the Despotic. In order to discover the nature of each, the idea of the least educated of men will suffice. I suppose three definitions, or rather three facts; the first, that the Republican government is that in which the people in mass, or only a part of the people, has the sovereign power; the monarchical, that where a single person governs, but by fixed and established laws; whereas, in the despotical a single person, without laws or restraint, conducts everything according to his will and his caprices." Lord Brougham's summary is most sensible: "Government," he says, "may be vested in a single person, or in a particular class different from the bulk of the community, or in the community at large. In the first case, it is a monarchy, and may be a despotism, or limited. In the second an aristocracy, which may be an oligarchy. In the third a Democracy, or Republic. In point of fact, a pure government of either form is exceptional—most governments being more or less a mixture of the essential elements of each." Each form has existed in reality, but as civilization advanced and population increased, other elements were introduced, until modern governments do substantially embody them all, but in different degrees. A judicious combination of these elements has been the dream of philosophers both of the ancient and the modern world. "*Status esse optime constitutam rempublicam.*" exclaims Cicero, (*Frag*), "*quae ex tribus generibus illis, regali, optimo, populari, modice confusa.*" Aristotle and Plato, Montesquieu and Harrington have all thrown out a similar suggestion. Tacitus treats the idea as Utopian: "*Cunctas nationes et urbes populus, aut priores, aut singuli regunt. Delecta ex his, et constituta reipublicae forma laudari facilius, quam evenire, vel si evenit haud diuturna esse potest.*" (*Ann. iv.*) Facts, however, are more potent than words, and nothing seems impossible to nature. New combinations have been formed for which no distinctive names have yet

been invented—for, as DeTocqueville suggests, men invent facts more easily than words.

While theory has thus yielded to the inexorable logic of facts, there will be found an apparently singular divergence of views among doctors as to the mode and measure of the combination. It is a favorite theory of many political thinkers that the mixture of the various elements must be such as to produce antagonism as nearly equal as possible. In this way, they think, a political equilibrium, most essential to the health of the body politic, is established. DeLolme's treatise on the English Constitution is based on this theory, and the motto of his book is, "*Librata suis ponderibus.*" Sismondi does not yield assent to this doctrine of antagonism, and insists upon a combination of the elements such as will produce, not mutual resistance, but mutual assistance, and joint action to a common object. M. DeTocqueville's views are thus expressed (*Dem. in America*, vol. 2, p. 144): "In order to preserve liberty it is not my opinion that many principles should be so mingled in the same government as really to oppose one another. The government which is called mixed has always seemed to me a chimera. There is not, in truth, a mixed government in the sense given to the phrase, because in every society we can discover a principle of action which controls all the others. The England of the last century, which has always been cited as an example of this sort of government, was a State essentially aristocratic, although great elements of democracy were embraced in its bosom; for the laws and the manners were so established, that the aristocracy would always in the end predominate, and direct public affairs according to its wishes. The error comes from this, that, seeing the interests of the nobles always in conflict with those of the people, the struggle was alone kept in view, instead of the attention being fixed upon the result of the strife, which was the important point. When a nation comes really to have a mixed government, that is to say, equally apportioned between contrary principles, it enters into revolution or becomes dissolved. I think, therefore, that a social power superior to all others must be placed somewhere; but I believe liberty to be in peril when this power finds before it no obstacle which restrains its march, and gives it time to moderate itself. Omnipotence in human hands seems to me a thing bad and dangerous."

After all, the difference between DeLolme, Sismondi and DeTocqueville upon this point, is more in words than in reality. DeTocqueville himself says, men invent or make facts easier

words to represent or define those facts. Governments have existed in which the various elements were so proportioned as to ensure the stability of the state and the prosperity of the nation. Perhaps we might not be able to say of any one of those cases, that the various elements were in exact or mathematical equilibrium—nor did De-Lolme, we may well suppose, have in view any such hypothetical assumption. All he meant, doubtless, was that the equilibrium should be such as to prevent any one element from entirely annulling all the others. So, also, the successful working of such a combination is not at all incompatible with the ascendancy of one of those elements, as required by DeTocqueville. And, if they do work together, notwithstanding their relative superiority or inferiority, they certainly may, in Sismondi's language, be said to act harmoniously for a common object. There is a theory of a German school of theology (the Tübingen School), in relation to the history and development of the Christian church, which strikingly illustrates the subject under discussion. It is called the theory of contradiction, and aims, by tracing the antagonistic elements at work in the bosom of the Christian societies at any one era, to discover the mean or resultant of those forces as the starting point for the study of the next era. These elements may exist simultaneously, and move on together, sometimes one attaining the ascendancy, and sometimes another, but never fusing into each other so as to leave one entirely in the ascendant. According to this theory, the doctrine of St. Paul as to the freedom of the new law from the ritual of the old and the sanctification of the believer by faith, is met by the adherence of St. Peter and the other disciples to the ceremonies of the Jewish law, until the mean result is worked into a church hierarchy symbolizing the forms of the Levitical Priesthood, and the dogmas of the Catholic faith. In the same way, the antagonism between the spiritualism of Christianity and the sensuousness of Paganism results finally in the worship of images, and the canonization of saints. It is not often, in other words, that the victory in the case of conflicting powers is so complete as entirely to destroy the vanquished. The latter is apt to retain a portion of its vitality, and may in its turn become the victor. "That which is called union in a political body," says Montesquieu, (*Grandeur des Romains*, ix), "is often a very equivocal thing. The true union is a union of harmony, which causes all the parts, however antagonistic they may appear, to tend to the general benefit of the society, as dissonances in music concur in a general accord. There may be a

union in state where one would only expect to see trouble—that is to say a harmony whence happiness results, which alone is the true peace. It is like the parts of the universe eternally bound together by the action of some and the reaction of others.” In fine, the harmonious working of political elements can not be predicated by theory. The combinations in reality are of infinite variety and incalculable complication—and incessantly changing. Stability depends upon more than the mere relative preponderance of elements.

All the various forms of government are substantially resolved into three—the monarchical, aristocratic, and democratic. The first may be defined to be the concentration of power into the hands of one man—whether for a term of years or for life, and whether by election or hereditary right. The second is the entrusting of power to a limited number as a permanent class, and this whether by election or right of birth. The third is the exercise of power by the people either directly, or through their representatives. In modern times these elements are all found to exist more or less, in the government of civilized nations—but in various degrees of combination. Singularly enough the ostensible form does not always represent the real form of government; or rather, to speak more accurately, the outward form often fails to indicate the really substantial element which prevails in the actual workings of the institutions of a country. The most absolute monarchy is frequently only an oligarchy—and this result is most common in that form of monarchy which may be deemed typical—the hereditary. For in an hereditary monarchy, there will always be periods when the incumbent of the throne is an infant, a *feme covert*, an idiot, or a *roi faineant* and, in such cases, the government is actually administered by a power other than that of the monarch. It has, consequently, been said of hereditary monarchies, with a point derived from the truth embodied in the words, that the King reigns, but does not govern. Even when the incumbent is not under disability, the royal power is transferred, according to the degree of respect for public opinion entertained at the palace, either to ministers of approved character, or to favorites, or to mistresses, or to eunuchs. From the liberal monarchy of Belgium to the (so-called) despotism of Constantinople, the monarchical element is existing in form, while often wanting in fact. All the advantages of unity of will, which constitutes the essence of monarchy, disappear as soon as the monarch resigns his power, whether he assist at the council or not, and whether he signs the orders of ministers or not. In the monarchy

of England which is, par excellence, esteemed the model of a constitutional government, this result has become the rule, and is held up as a maxim of liberty. The monarchical element of the British government is literally only a form—the government being in fact an aristocracy with an infusion of the democratic element. The monarchy is firmly established, is hereditary and permanent, but the occupant of the throne is a cypher. The Prime Minister, who holds his place not at the will of the Sovereign in reality, whatever may be the theory, but at the will of Parliament, is the real “power behind the throne greater than the throne itself.” The titular Sovereign is a simulacrum, like the spiritual ruler of Japan. The government is, therefore, an elective monarchy, as much so as the consular government at Rome, or the government of the Directory of France. This result in England is of modern growth, and has been largely brought about by the long imbecility of George III. The effect thus far has been very happy, for while retaining the advantage of the hereditary system, the change has ingrafted thereon the benefits of the elective system. These benefits are the entrusting the executive power to temporary and responsible agents, and the limitation of the tenure of office to the period during which the incumbent retains the confidence of the electors.

Sismondi, in his *Etudes sur les Constitutions des Peuples Libres*, does not hesitate to give the preference to the elective over the hereditary monarchy. He contrasts the two in the cases of the German Empire and the French Kingdom, and shows, by the actual statistics, that the wars which were originated in each by the form of government—that is to say, growing out of differences of opinion as to the person elected, or the person entitled to office by hereditary right, were more numerous, longer and fiercer under the hereditary than the elective system. He insists, also, that the elective form was eminently successful for several hundred years in the case of the Roman consuls, who were elected only for a single year,—and for a thousand years in the case of the Doges of Venice elected for life. It is the unity of will, not its duration, he says, which constitutes the monarchical element. This unity was ensured in the case of the Roman consuls by making each independent of the other, and supreme for the province assigned to him. He dwells upon the fact, that although clothed with such extensive powers, always at the head of armies, and often elevated by victories, the consuls, for over four hundred years, made no attempt to abuse or perpetuate their authority. “No other government in the world,”

he emphatically adds, "has ever presented so long a guaranty against the temptations to usurpation; where it no longer sufficed to this end, it was because Rome, already corrupt by the conquest of the world, was no longer capable of good government." This is in marked contrast with DeLolme's readings of Roman history, when, in his treatise on the English Constitution, he undertakes to compare the elective with the hereditary system, and always in favor of the latter, for which he was an uncompromising advocate.

The monarchical element is not, therefore, dependent upon the ostensible form of government. It may exist in a Republic,—it may be absent in an Autocracy except in name. The President of the United States has more power than the Queen of England; nay, for that matter, if existing facts are a test of right, he has as much power as the Czar of Russia. The consuls of Rome were as supreme, during their year of office, as either the first or third Napoleon. On the other hand, a rich and powerful nobility does not necessarily constitute an aristocracy. They may be only a privileged caste without possessing any political power. This was eminently true of the *ancienne noblesse* of France. The Senate of Rome and the Senate of Venice, although elective, were, on the contrary, a real power. It is obvious, therefore, that to ascertain the true nature of a government we must go below the surface, and examine the internal machinery. A combination of the elements may exist under any of the ostensible forms. The object of the statesman should be to regulate those elements, not upon any preconceived ideas of abstract theory or philosophical ratiocination, but in view of the past history, the acquired feelings and prejudices, and the peculiar idiosyncracies of the people over whom he may be called to preside. To transfer the liberal features of the really aristocratic government of England to France, would be at once to produce anarchy—for France has no aristocracy to act as a fly-wheel in the powerful machinery, and no natural gifts or long and gradual training in the body of the people to enable them to perform that function for themselves. To introduce the form of monarchy into America would be the height of folly, for the whole nature of the American would revolt at the external paraphernalia, while it cheerfully submits to the really monarchical element in the unity and power of the Federal Executive. What every nation requires, according to the habitudes and peculiarities of its people, is so much of the monarchical system as implies a prompt, firm, and independent executive; so much of the aristocratic system as ensures the

wisdom, prudence, vigilance, and experience of a permanent legislative class—a senatorial element; and, lastly, so much of the democratic system as will secure an efficient and healthful vitality by the infusion of new blood and fresh vigor into the body politic at proper intervals. A head to give unity of action, a senate to produce regularity of motion, and a popular element to create the motive power—these are the essentials of a good government, call it by whatever name you will.

In the formation of society, the first form of government is obviously the patriarchal. The father, as head of the family, performs the functions of leader, law-maker, and judge—the law-making being usually coincident with the judgment. The clan or tribe is only an enlargement of the family, the chief being at first, no doubt, of the blood of the common ancestor, and owing his position to the direct or tacit choice of the whole tribe. The hereditary quality, so far as it contemplates a fixed and invariable line of descent, is not necessarily attached to the position; on the contrary, such a quality is, in the origin of society, incompatible with the necessities of the infant State. The chief must be capable of command, and of sufficient experience to enable him to decide satisfactorily the differences and disputes of the members of the tribe. It is only after society has become settled, and the people have learned that these functions may be performed by proxy, that the doctrine of the descent of authority by right of birth can grow into being. Obviously, therefore, this principle is not inherent in the monarchical system, but only a modification of that system. In the selection of the chief, whether by direct vote or tacit assent, all the tribe at first have a voice. The democratic element, consequently, lies at the foundation of all government beyond that of the family. The tribe or people join in selecting a chief to rule over them. The democratic element almost always exists, also, at the outset, in another form—and that is in a council of elders or chiefs. The old men of the tribe, by that reverence for age which nature has implanted in us, form a council to aid and assist the chief. After a time, the younger members of the tribe, who may have early distinguished themselves by deeds of daring or by the exhibition of superior capacity, are admitted into the council. In this way the aristocratic element comes into being, the quality of hereditary descent being no more essential to its existence than to that of the kingly office. The democratic element, then, lies at the foundation of the monarchical and aristocratic systems. In addition, although

in the beginning the decision of the chief in each case as it arises is the only law, the next step which follows of laying down a rule of conduct is almost always first approved by the body of the tribe. The act of the chief, or chief and council, is submitted to the people before being enforced. In the early stages of society, when the only avocation of the men is war, and when all the drudgery is performed by women or slaves, this system naturally prevails, and embodies, as is manifest, all the different elements of existing governments. As the nation enlarges its limits, and increases its population, and as the varied interests of society develop themselves, modifications of the primitive system are gradually introduced. In the first place, the chief ceases to perform in person all the functions of his office, and becomes the source of power rather than the power itself. This change renders the personal qualifications of the incumbent of the throne less important, and the principle of right by birth becomes possible. In the second place, the assent of the people in the selection of the chief and council becomes more difficult with every new addition of territory and population, and less important as the active co-operation of these functionaries in the performance of executive duties diminishes. It is apt to cease altogether when the doctrine of hereditary right has grown into consistency. For ordinary purposes the authority of the chief and council is deemed sufficient for an act or an ordinance, and it is only on extraordinary occasions that the people are consulted. From this the step is easy to the entire absorption of authority by the governing class. When a nation has attained a certain growth, a return to the democratic element becomes impossible, except upon the principle of representation—a principle of modern development. Even the principle of division of power upon which civilization now rests, has been of such slow and uncertain growth that Sismondi can say, as he does, that the separation of the executive, legislative, and judicial functions is rather a fact than a principle. At first they were all centered in the chief, then in the chief and people, then in the chief, council and people, then in the chief and council, and finally in particular persons or bodies designated for the specific execution of distinct functions.

The people act at first directly and, doubtless, by majorities, but, as population increases, the franchise has not been, in point of fact, equally and proportionally extended. The actual progress seems to have been made not by individuals but by masses. If another tribe or people were incorporated in the nation, it was taken as a

unit. The vote, therefore, to use a modern word, upon national questions would be by families and tribes, not by individuals. Wise legislators, such as the early kings of Rome, took advantage of this existing fact, and so arranged the tribes, centuries, or voting bodies, as to give greatest weight to that part of the community in which was found the most intelligence. After the tribal status ceased to exist, the same result has been attained, whenever the popular element has been allowed a voice, by incorporations. The free cities, trades, and guilds of the middle ages are noted instances. Universal suffrage, in the modern acceptation, has never prevailed, until within the present century, except in very small communities—and those slave communities, that is to say, where there was a servile class who performed all the drudgery of life, and who were themselves excluded from the exercise of the privilege. The principle is, therefore, one which remains yet to be fully tested by experience. It owes its existence to the philosophic teachings of the last century in relation to the rights of man and the universal brotherhood of the human family. These ideas, combined with the rapid development of free thought which marks that era, led to a belief in the continuous progress and ultimate perfectibility of man, and this sentiment was so strong that the element of time was lost sight of. Like the apostles of our Saviour, whose conception of their Master's second coming was so vivid that the event was daily looked for, the apostles of freedom dreamed that all men would be rendered capable of self-government by the very existence of so great a boon. This is no impugment of the truth of their philosophy, any more than the mistake of the Apostles of Christ can be considered as a denial of their high mission. The inspiration of the latter extended only to the fact of the second coming; not to its date which, as their great Head Himself said, was known only unto the Father. That they should have leaped to the conclusion that the great event would happen speedily, evidences their genuine enthusiasm. So, the closet politicians of the last century were equally misled by their zeal, want of experience, and the natural inclination of the human mind to carry out a theory at once to its practical results. Time and experience are required in all cases to temper the logic of theory by "the inexorable logic of facts," and to convince us that the material world does not act with the rapidity of thought. The young and enthusiastic are ever prone to lose sight of this fact, and the discoverers of, and converts to new theories are always in the

same category. It does not follow, however, that a theory is erroneous, although its practical application may be dangerous without sufficient preparation. The part of true wisdom is not to rush too hastily to conclusions, nor to attempt new projects too rapidly. The successful establishment of free government in America seemed to demonstrate the correctness of the theories we have alluded to. The reign of terror in France, and the massacres of Hayti, were not sufficient to affect established convictions. More than half a century of adverse events were required to weaken our delusions. The failure of repeated French revolutions to give liberty to her people, the total inability of the Spanish republics in America to establish stable institutions, and the seeming incapacity of the African to retain even the civilization of absorption, have at length produced a re-action—which has been greatly accelerated by the grand catastrophe of the model Republic. The danger is that our political thinkers may now rush to the opposite extreme, and attribute acknowledged calamities to wrong causes. Neither free institutions nor popular suffrage had anything to do with the most significant of these calamities. Let me dwell upon this point for a moment.

Rebellions or revolutions—for the words are interchangeable dependent upon the final result—are caused: 1. By arbitrary and oppressive conduct by the government. 2. By diversity of interests in the sections of country or peoples governed. 3. By differences of race or nationality. 4. By divergences of opinion on questions of religion or morals. Each or all of these causes may exist or arise under any form of government. The English revolutions of 1640 and 1688, were due principally to the first cause, aided in some measure by the fourth. The American revolution of 1776 may be traced almost entirely to the second cause, notwithstanding the long array of (so-called) arbitrary acts paraded in the Declaration of Independence. All extensive empires even of the same race are subject to this powerful lever of disintegration. The periodical uprisings of Poland and Hungary, the restlessness of the Irish under the rule of Great Britain, and the formidable outbreaks of the Moors in Algeria, and the natives of Hindostan, attest the irresistible influence of the third cause. We say, irresistible, because no real benefits derived from the actual government, and no excess of prudence or concession, or, on the other hand, of rigor and strength of the governing power, can prevent its occurrence. The vast benefit to the whole world and to the subject race, of the

rule of France in Algiers, and of England in the East Indies, is beyond all question, while the material resources and wealth of the ruling nations render a successful rebellion hopeless—nevertheless, outbreaks do occur and will continue to occur from time to time. The fourth cause of revolution has been really the most frequent of all. The civil wars of Germany, to go no further back, the civil wars of France, the civil wars of the Spanish Empire in the Netherlands, and, still more recently, the conflict, on the same theatre, between the Belgians and the Hollanders, are sufficient instances of its operation. Now, it is obvious, that if each of these causes is so powerful in what are called strong governments, all or most of them combined would prove too much for any government under the sun. All of them have been at work, and have been necessary to bring about the American catastrophe. In the debates of the convention which framed the constitution of the United States, the danger to the Union arising out of the different interests of the members, was frequently noticed. Mr. Madison, in discussing the mode of electing the Senate, dwelt upon the point with manifest apprehension: “He contended that the States were divided into different interests, not by their difference in size, but by other circumstances, the most material of which resulted partly from climate, but principally from the effect of their having or not having slaves. These two causes concurred in forming the great division of interests in the United States. It did not lie between the large and small States. It lay between the Northern and Southern; and if any defensive power were necessary, it ought to be mutually given to these two interests. He was so strongly impressed with this important truth, that he had been casting about in his mind for some expedient that would answer the purpose. . . . He would preserve the States’ rights as carefully as the trial by jury.” His idea was that the diversity of interests thus referred to would lead to the oppression of the weaker body of States by the stronger, and that it was important, if possible, to give to the weaker some means of defense against such aggression. The majority of the convention seemed to think the danger obviated by withholding from the general government the power of coercion. The fact that the general government might make common cause with the stronger States seems not to have occurred to them. It was reserved for a profound thinker, at a much later period, to point out this danger. In considering the question of the secession of one of the States from

the Union, M. DeTocqueville thus expresses himself: "Moreover, a government, even if strong, can escape with difficulty the consequences of a principle, when it has once admitted that principle itself as the foundation of the public law which ought to guide it. The confederation has been formed by the free will of the States; these, in uniting with each other, have not lost their nationality, and have not blended themselves into one and the self-same people. If, at the present day, one of those same States wishes to withdraw its name from the contract, it would be rather difficult to convince it that it could not do the act. The Federal Government, to resist it, could not, in a satisfactory manner, rely upon either force or right. In order that the Federal Government might triumph easily over the resistance offered by some of its subjects, it would be essential that the individual interests of one or more of these subjects should be intimately bound up in the existence of the Union, as has often happened in the history of confederations." How accurately is this suggestion, and the fuller explanation of it which follows, borne out by the facts in the present deplorable contest. The Northern States have an interest in retaining control over the productions and trade of the South, and, therefore, they have thrown the whole weight of their power in support of the general government. The diversity of interests, therefore, between the Northern and Southern States, distinctly foreseen by Mr. Madison from the outset, and which as early as 1832 threatened a disruption of the Union, has been a powerful cause in producing the present revolution. The existence of slavery has, also, as will be shown hereafter, tended to produce a difference of nationality between the North and the South, notwithstanding the unity of race. To these primary causes of division, must be added, though subsidiary to them, the divergences of opinion between the Northern and Southern people on the religious and moral aspects of slavery. The workings of this cause, although not very obvious in the political field, had begun to display themselves in the schisms of our great religious denominations, and its latent power has been brought out since the actual commencement of hostilities. Still, such was the cohesive power of the American Union, that all of these causes combined would have failed in dissolving it, except for the arbitrary and oppressive acts of the government. These have rendered final what might only have been temporary. The same causes would have produced the same result, even more speedily and certainly, under

a despotism, or constitutional monarchy as under a republic. Philip the II. was a despot, and George III. a constitutional monarch. Could either of them prevent a successful revolution of a part of their subjects? Those who hastily attribute our present calamities to the character of our institutions, take a very narrow view of the subject. Human nature is substantially the same in all countries, and the same causes will produce like results under any form of government.

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## THE REBELLION.

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In an article with the above caption, a writer in the last April number of the REVIEW "takes a glance at the late unpleasantness through legal spectacles," and from his view of the nature of the United States' Constitution, concludes that the Southern movement was treason against the United States Government; that the war was a civil one, and the concession to the rebels of belligerent rights was merely in the interest of humanity, having reference to their treatment during the war and not protecting them from the legal consequences of treason when the war was over. The present writer has long since accepted the situation, and with it the view imposed by the Government, upon the principle of self-preservation, or otherwise, as the law of the matters involved in the contest. Both the human and divine law concur in enjoining a respectful obedience to the powers that be, and this every good citizen will render without useless complaint. It certainly will not be attempted to justify the effort of the Southern States to sever their connection with the Federal Union; nor will the moral right or wrong of the movement be passed upon, as it is not involved in the discussion. The object of this article is simply to attempt the refutation of an argumentative view of the nature of the Government, which has been advanced as the foundation for the conclusions above stated. To say: You are traitors, because the United States Government so declares you, is a very different declaration from, you are traitors, and I can prove it logically. Besides, the writer afore-said deduces from his view a conclusion not yet arrived at by the United States Supreme Court, as it is believed. The Confiscation and Abandoned Property Acts are to be legally maintained. This affects a number of Southern people. The present writer's ancestral home in the Old Dominion was confiscated during the war, and a writ of error taken in 1865 is still pending in that court for its recovery. But to proceed without further preface. That writer concedes the position of Mr. Calhoun, that the Constitution is a compact between the States, to which they became parties as States; and according to Mr. Webster's view this being conceded all would

be lost. This is liberal; it speaks volumes to the credit of Mr. Calhoun and justifies the remark of the eccentric John Randolph, who was sitting near that great statesman, while speaking in defense of his resolutions in the Senate on the 26th of February, 1833: "Take away that hat; I want to see Webster die, muscle by muscle." Indeed, this concession is about all the States' Rights School contended for; the result was conceived to follow logically in their favor. "But," says the writer, "now arises the true point of contest between the two opposing theories, which is this: What sort of compact was that Constitution, and what was the result of its adoption?" He says Mr. Calhoun stickles for the term *constitutional* compact, and he endeavors to show that it is a *social* compact, the result of which was to blend the parties into a composite State. He asks, "Might not a compact blend States previously separate into one? Might not the nations of Europe, if desired by all of them, consolidate themselves into one nationality, by adopting, each for itself, an instrument providing for this result? Yet this transaction would derive all its force from the principles of a compact. Every party would be free to adopt or reject. Writers on government refer its obligation ultimately to a *social* compact between previously independent individuals. But do they not all concede that when the compact has been executed, the parties become blended into a community, their independence and right of private judgment being surrendered up to the society formed by the compact; and that the powers conferred upon the government thus constituted can only be withdrawn by a revolution? Now the only actual cases of social compact," he continues, "have been where the parties were States. Political societies *have* been formed by the aggregation of previously independent communities, whilst there is no precedent of a community formed by the association of previously independent individuals. Any arrangement by which the contracting parties, whether individuals or States, form themselves into a body politic under a common government is a social compact. And the result of the adoption of a social compact is to blend into one entity, to the extent comprehended by the scope of the compact, the parties thereto. The assertion that the States after taking the plunge of ratification, did not blend, is pure assumption."

This is specious reasoning and deserves close scrutiny; upon it his premises are founded, and upon the truth or falsity of them, it is conceived, the whole question theoretically depends.

It is certainly true that a compact may blend States previously separate into one, and that the nations of Europe, by adopting a compact, may consolidate themselves into one nationality, and that such transactions would derive all their force from the principles of compacts; but such compacts must have *no other terms than those which blend the sovereign parties*, for any others would, of course, become nugatory at the will of the consolidated government, their independence and right of private judgment being surrendered up to the society, formed by the compact, its will would be the law of all. It will also be admitted that the only actual cases of social compacts have been when the parties were States, and that the result of the adoption of a social compact is to blend into one entity (or entirety) the parties thereto, whether individuals or States. If a blending is provided for, the extent comprehended by the compact, though, is a meaningless expression; for, according to the quotation just made, and *ex vi termini*, the blending into an *entity* makes its will the law for the whole government, restrictions as to the extent to the contrary notwithstanding. An entity is an entire thing; a blending can not be partial. The composite government, *if there is a blending*, is sovereign, and though it usurps powers expressly reserved by the component parts, it can not be rescinded except by revolution. It makes but little difference, therefore, whether according to Jefferson, Madison and Calhoun, the Constitution be called a *constitutional* compact, or, as the writer denominates it, a *social* compact. It is but a stickling for terms; for this is the logical result of a blending by compact, social or constitutional.

It must be confessed that such a view of our Constitution would have startled even the *national* fathers themselves, and if sound, would have more than satisfied Mr. Hamilton's desire for a strong government. It would also have been eagerly grasped by both Webster and Story. Our Constitution would verily be a paper one, so far as limitation and restrictions are concerned. The writer says, the assertion that the States, after taking the plunge of ratification, did not blend, is pure assumption; but it is submitted that unless he has shown, or does show from the compact itself, that the States *are thereby blended* into an entity, his assumption that they did blend is, especially in view of the result, at least equally as pure. He certainly does not mean that the mere entering into a compact has the effect of blending nations; for any executed treaty, such as one in regard to boundaries, etc., is a compact, but he must be understood to mean the entering into a compact, the

terms of which blends the parties and surrenders the previously existing sovereignties to the entity. Still he does assume, without mentioning a single clause to justify it, that by the adoption of the Constitution, the States became parties to a social compact, the result of which was to blend them into a composite state. He, however, subsequently reasons from the clause in the Constitution providing for amendments, and as his argument is quite ingenious, and constitutes his premises, indulgence is asked for quoting it in full.

“They (the States,) became thenceforth (after the adoption of the Constitution), one as to foreign relations, as to commerce, as to the operation of the national laws. The coin, the flag, the army, the navy, became national. But the essence of the transformation consisted, in the last analysis, in this, that the SOVEREIGNTY was transferred from its former seat to a new one. The word ‘Sovereignty,’ is less understood than any other in the political vocabulary. Not one man in a hundred who uses it has any definite notion even of what he himself means by it. And the highest authorities unguardedly misuse it. Thus we often hear from courts and text writers, that sovereignty in this country is *divided* between the States and the United States. Sovereignty can not, in the very nature of things, *be* divided. It signifies the ultimate, absolute, illimitable power that exists *somewhere* in every independent society. In Great Britain it resides in Parliament. When Louis XIV. exclaimed “*L’etat c’est moi!*” he asserted that the sovereignty of France was concentrated in him. In Russia, I presume, sovereignty now abides in the Czar. Before the adoption of the Constitution, sovereignty resided in each State. The State then knew no superior. Its will was limited only by its physical power. But the States are not *now* sovereign in any sense. They are now restrained by the Constitution of the United States, etc. Congress is not sovereign, for it has only powers affirmatively granted—expressly or impliedly. But the power which can amend the Constitution of the United States is *illimitable*. Here then we arrive at the sovereignty in our system. Here resides the WHOLE potentiality of the system, which may re-partition the powers of the States and the composite State;—may re-distribute the functions now divided between the local governments and the general government; may contract or dilate the sphere of either, *ad libitum*; may reduce the central agency to a shadow, or erect it into an empire. The only *possible* security in the nature of things against the exercise in any given

manner of this power, lies in the genius of our people. The State governments and the General Government are the mere creatures of this Omnipotence, mere tenants at will. Now the adoption of the Constitution of the United States, was a surrender of the sovereignty by the States individually to the States united. This alone need be looked to, to show that the United States is not a confederacy, but a composite State. It is an axiom of political science that where the sovereignty abides, there the allegiance is due. Also, that unless there is allegiance, there can be no treason, in the strict sense of the term, which involves a breach of allegiance.

"Now the Constitution recognizes that treason may be committed against the United States. \* \* \* \* \* I know that the State laws provide for a crime which they denominate treason, but it is not properly treason, though justly punishable by them. I know, also, it is common to hear of a paramount allegiance due to the United States, and a subordinate allegiance due to the State. But there is no allegiance, in the strict sense, due to the State. Allegiance is due to the composite whole, in which the sovereignty resides, of which the States are members. \* \* \* \* \* It results, then, that the Southern movement, right or wrong, was a rebellion, and those concerned in it are seen, through merely legal spectacles, to have been guilty of treason."

This lengthy quotation has been made so that there can be no mistaking the position assumed, or the applicability of the reply. The definition of sovereignty above given, is, of course, accepted and approved. It has frequently been "unguardedly misused," for want of a better term to express the powers of the United States Government and those of the States, but it is not understood that there has been any difficulty in defining it; the dictionaries do this very well.

Is it not strange that so much stress should be laid upon the amending clause, when the Constitution itself, under the supposition of its ratification, blending the States into an entity, can be abrogated or set at naught by a single act of the composite government? For surely a consolidated composite State can change its form of Government in any manner that those having the power see proper, and an unsuccessful resistance by any of its integral parts would subject the inhabitants thereof to the penalties of treason, however just their cause. But, says the writer, it is admitted that the President, the Judiciary, and the Congress, (in other words, the actual government of the United States), are not sovereign, for they have

only powers affirmatively granted, the real sovereignty against which only treason can be committed, is the power which can amend the Constitution. Now, if this be true, does it not falsify the assumption that the States became blended by the ratification? What was the use of nominating any amending power when it was already possessed in as ample a manner as the nature of any composite government will allow? If there had been no amending clause, the Constitution could then have been amended only by all the States giving their assent as States, just as the Constitution itself was formed, and if any State refused, the new Constitution would have been binding only "between the States so ratifying the same." One refractory State could have defeated the Constitution, severed its connection, or it would have become a subjugated province, but, in any event, its people would not be punishable as traitors. These results are certainly not consistent with the definitive idea of a composite blended State. If every State had to be consulted, and its assent obtained before the most immaterial change could be made, what is the Government but a league or confederacy? Would not the essential of a composite Government be wanting?

Is it to be understood then that the amending clause works such a change in the nature of the compact? Certainly this is ascribing to it a very novel capacity, and one, it is thought, entirely foreign to the object which the clause was really intended to accomplish.

It will be admitted that three-fourths of the States *may* blend themselves and the rest into an entity, and surrender to it their sovereignty, by an amendment providing for such a result. But it does not follow that such is their present condition. If several sovereign nations enter into a strict league and agree to a clause providing for an amendment with the assent of a majority so as to make one composite government of them all, (if such a case is conceivable), would such a clause prevent any one of the nations from determining the *casus feoderis*, and repudiating the league for what it deemed an infraction? Eleven of the States of this Union attempted to sever their connection with it, and if the States were not already blended, there was not left enough to amend the Constitution so as to include these eleven. How could they be affected by the amending power? Where would the sovereignty be then?

It is thought that the mistake of the writer is, in assuming, for his premises, what the United States may become by an unlimited amendment or abrogation of the Constitution, instead of taking it as it existed at the beginning of the late war.

But is the amending power the real sovereignty of our system? Sovereignty is defined to be "the ultimate, absolute, illimitable power that exists *somewhere* in every independent society." The power which can amend the Constitution, he says, is illimitable, and this omnipotence the sovereignty. Now, the Constitution provides that "the United States shall guarantee, to every State in this Union, a republican form of government." This amending power is *restrained*. An amendment, which deprives any one of the States of its republican form of government, is unconstitutional, and not binding; it can only be enforced by physical power, though assented to by the requisite number of States, to make a legal amendment. Again, the very article giving the amending power provides "that no State, *without its consent*, shall be deprived of its equal suffrage in the Senate" by any amendment to the Constitution. How does this agree with his definition of sovereignty—that illimitable power which may re-partition the powers of the States and the composite State *ad libitum*—may reduce the central agency to a shadow, or erect it into an empire? This power, then, is certainly not sovereign, and "Congress is not sovereign—for it has only powers affirmatively granted," and sovereignty must exist "somewhere in every independent society." Where, then, does it reside if not in the States? It will not answer to say that it belongs to the States united, for this would but be a recurrence to the previous condition of the States; it belonged to them under the Articles of Confederation. So it belongs to any association of States.

As to the doctrine of allegiance, he says it is an axiom of political science, that where the sovereignty abides, there the allegiance is due, and unless there is allegiance there can be no treason, and that the Constitution recognizes that treason may be committed against the United States. The inference he wishes to draw from this is, that as the Constitution recognizes that treason can be committed against the United States it also recognizes that the United States—the composite government—is sovereign; a very fair inference too. But the State laws also provide for treason against the States, and have always so provided, and may not there be the same inference from this as to the sovereignty of the States? His statement that, as regards the States, this crime is not treason, though properly punishable as such, is pure assumption, if his argument that the United States is a composite government, in his sense of the term, is not sound. Should it not rather be said that the crime, which the United States Constitution denominated treason, is not properly treason, though justly so punishable?

At page 337, he says, that after the war, all acts must be regarded from the point of view of the victor, and at page 350, he repeats, the view of the conqueror becomes the law as to matters involved in the contest, and the Supreme Court decisions should be regarded as conclusive. Now, at this position, no reflecting Southern man is disposed to murmur. It is not understood that the Supreme Court has adopted a view of the Constitution which, as opposed to the several States, makes the United States *a composite sovereign State*—as France, England, or Russia, is sovereign.

While upon this subject, it may not be out of place and uninteresting to add a little to the States rights view of the Federal Government which is very well, though not fully, set forth on pages 313 and 314 of the article, and to arrive at a position from which the reader may view the late unpleasantness through legal spectacles, not put upon his eyes by the United States Government. It is well stated, on the pages above cited, and by an able argument on pages 317 and 318 (which is hereby adopted), clearly proven, that the "Constitution was beyond controversy, not adopted by the people, but by the States as States; that it was a compact between the States to which they became parties as States." The true point of controversy is stated to be this: What sort of compact was the Constitution, and what was the result of its adoption? His view has been sufficiently quoted and discussed. By the way, what is a little remarkable about his view, during all the discussion which preceded the adoption of the Constitution, and in all that has taken place since, throughout the elaborate commentaries of Story, and in all the "Great Debate," not one argument has been advanced, so far as can be ascertained, to show that the States by the adoption of the Constitution as a compact between previously existing, sovereign States, became blended into an entity—and the United States a composite State, in his sense of the term, except the ingenious effort of the writer in the April number. This should excite close scrutiny of his reasoning, and, if found false, add respect, if not weight, to the views of the old fathers, Jefferson and Madison, as to the nature of the compact and the result of its adoption. They, with Mr. Calhoun, state it to be a *constitutional* compact between the States, the result of which was the creation, by the States in their sovereign capacities, of the United States Government. In other words, the United States is the creature of the States, and if the powers granted to the States united, be valid, it is solely because they are granted; and if the granted powers are valid, because granted, all other powers not granted must not be valid. And whether the

Constitution be called a "social" or a "constitutional" compact, it is a written compact enumerating particularly the powers granted, and reserving all others to the States—that this particular enumeration necessarily explains and limits certain general phrases copied from the old Articles of Confederation; that it is a plain principle, founded in common sense, and illustrated by common practice, and essential to the nature of compacts, that when resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort whether the bargain made has been violated; that there can be no authority above the States—the parties—the creators—to say, in the last resort, whether or not the compact has been violated, or judge of the granted or reserved powers; that the States have an equal right to judge for themselves, not only of usurpations and infractions, but also, in Mr. Jefferson's language, of the mode and measure of redress; that when it is claimed that the States granted this right of judging in the last resort to the United States, the Constitution, as it exists, must be produced, and the clause pointed out which, beyond doubt or cavil, surrenders a right endangering the very existence of the States; that it is no answer to say, that this right, if allowed to the States, would defeat the Constitution and destroy the Government (the creature), because, to allow it to any other power than the States, would be to destroy the States—the creators; that (adopting language quoted above in regard to the amending power), "the only possible security in the nature of things against the exercise in any given manner of this power, lies in the genius of our people," who may, if they desire, alter the form of government, and grant such powers as they see proper; that, however true it may be, that the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the other departments of the Government; not in relation to the rights of the *parties to the constitutional compact*, from which the judicial, as well as the other departments of the Federal Government, hold their delegated trusts; that on any other hypothesis, the delegation of judicial power would annul the authority delegating it, and the concurrence of this department with the others in usurped powers might subvert forever, and beyond the possible reach of any rightful remedy, the very Constitution which all were instituted to preserve.

This reasoning, which is Mr. Madison's, answers the subsequent

views of Mr. Story, who contended that each department of the Federal Government, and each member of every department, is the interpreter of the Constitution for itself in the first instance, whenever called upon to act under it. If the question was not of a nature to be capable of a judicial decision, he considered such determination by the department called on to act, whether it be the executive or the legislative, to be final. If it be capable of judicial investigation, he regarded the judicial power, and the Supreme Court of the United States as the head thereof—the final arbiter of the constitutionality of the act. He allowed no interpretation by the States. He denied that the United States Government is a compact between the States in their sovereign capacities as parties, but insisted that when the evil of infraction or encroachment becomes no longer endurable, resort must be had by the *people* and not by the *States*, to the ultimate right of resistance. Even this view recognizes the right of resistance; it only refers to the people instead of the States the right of ascertaining the usurpation or infraction in the last resort. But the answer as given above seems conclusive, as far as reasoning can make it. If it is once conceded that the Constitution is a compact, as stated above, the logical conclusion is irresistible, that the States have the ultimate sovereignty, and to them allegiance is due by the citizens respectively; that according to common sense, they are the judges in the last resort of usurpations and infractions of the Constitution which they made, as well as of the mode and measure of redress. Mr. Story and Mr. Webster felt the force of this reasoning and admitted it, but denied the premises. Our writer admits the premises but denies the conclusion.

For the purpose of showing what shifts were resorted to to evade the unanswerable logic of the advocates of States' rights, another view of the Constitution, by a certain school, the chief exponents of which were Mr. Story and Chancellor Kent, may be barely noticed. It was this: That the independence of the United States was a *joint* and not a separate independence—the logical result of which doctrine is that the States are the creatures of the United Colonies, and all the rights and prerogatives of the States are the gifts of the general government—the United States—and all power not delegated to the States, remains in the Federal Government. This view flourished awhile, and though long since exploded by reason, and by an express amendment to the Constitution, has been

physically enforced by the late war. According to our writer, the Federal Government, in a contest with any of the States, can roll up and set aside the Constitution, and any powers which it can physically exercise, are rightful. The war power of the Government is not to be restrained to its "*ordinary* sovereign or municipal rights," as defined by the Constitution; but military governors and military courts may be appointed at will by the Federal Executive, and Confiscation and Abandoned Property Acts be passed by the Federal Legislature, according to the exigencies of the case; and as a consequence of this, in a war with foreign nations—when ever the war power is called into requisition—the ordinary sovereign rights of the Government may be overstepped and the Constitution disregarded; and this is the logical result of a blending into a composite State. Now, while these acts may be sustained by the United States army in time of war, the question recurs upon the return of peace—at least in this narrowed form—will the acts of the Federal Government professedly performed "to put down rebellion and punish treason," and which could be justified, according to the laws of either national or civil war, only upon the hypothesis that the United States Government is sovereign, in the international law sense of the term (contradistinguished from its *ordinary* sovereignty), be held valid when they are in a condition to be questioned before the Supreme Court of the United States, whose judges are sworn to protect the Constitution?

Our writer has labored very industriously to prove that the Federal Government, in the late war, could exercise both belligerent and sovereign rights. The view of the Government being established *by the result of the war*, this elementary principle of the laws of civil war will readily be admitted.

But the acts above can not be justified as the exercise of belligerent rights; because, in many instances, their subject-matter was neither prize, booty, nor contraband of war, nor things appertaining thereto; but more especially because, viewed as a belligerent attempting to enforce belligerent rights, the penalties of rebellion and treason are totally inapplicable. True it is, that after the war the successful party can assume its ordinary sovereign rights; but this does not answer the question, for it could exercise ordinary sovereign rights during the war. He answers it by saying the warrant is to be found in the expansion of the *war power* of the United States Government growing out of the emergency of a

gigantic rebellion. Startling as the suggestion of a war power in the Government, not restricted by the Constitution, would have been to its founders, this is but begging the question, or at most, but justifying the acts with the United States army in time of war.

It remains now to be seen whether the Supreme Court of the United States will maintain them. Certainly, if time is an indicator, it has betrayed reluctance in the Abandoned Property Case in point.

EDMUND S. MALLORY.

Jackson, Tenn.

## Digest of English Law Reports for August, September, October and November, 1873.

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### AGENT.

1. *Company—Director—Warranty of Authority—Misrepresentation of Fact.* The directors of a railway company which had fully exercised the borrowing powers conferred upon it by its special act, in August, 1864, advertised that they were "prepared to receive proposals for loans on mortgage debentures," "to replace loans falling due." W. W. (the plaintiff's testator) offered a loan of £500; and, his offer being accepted, he in the same month, sent his cheque for £500 to the directors, for which he requested that a debenture should be issued to him. In pursuance of a resolution of the directors to that effect, the cheque was handed to H., the contractor for the works, who had been (but then had ceased to be) the holder of seven debenture bonds for £500 each; and H. was requested to transfer one of them to W. W., and it was by the same resolution directed "that such bond be on the 1st of October exchanged for a new one." H. kept the cheque (which was duly honored), but was unable to transfer the debenture; and in pursuance of a resolution of the directors of the 5th of October, a new debenture bond for £500 was sealed and sent to the plaintiff, as executor of W. W. The defendant, a director of the company, was a party to each of the above transactions. By a decree of the Court of Chancery, of the 14th of February, 1868, the above mentioned debenture was declared void, as being for a sum in excess of the borrowing powers of the company. Upon a case stated for the opinion of the Court, without pleadings, and upon the argument of which it was agreed that no question of non-joinder was to be raised:

*Held*, that the defendant was liable as for a breach of warranty; that the directors had power under the circumstances, to issue a debenture, which would be valid and binding upon the company; and that the plaintiff was entitled to recover as against him the £500, together with interest by way of damages: *Weeks v. Propert*, C. P., vol. viii., 427.

2. *Indemnity of Agents—Stock Exchange Usage—Defaulting Broker.* The plaintiffs, brokers on the London Stock Exchange, bought for the defendant (who was not a member of the Stock Exchange), certain shares for the account of the 15th of July, 1870, and on that day, by his instructions, carried them over to the account of the 29th of July, and paid differences amounting to £1688. The defendant and various others, principals of the plaintiffs, not having paid the amount due from them in respect of contracts for the 15th of July, the plaintiffs became defaulters, and on the 18th, in conformity with the rules of the Stock Exchange, they were declared defaulters, and their transactions were closed, and accounts were made up, at the prices current on that day. On the closing of the accounts, a further sum became due from them in respect of differences upon the contracts carried over by them for the defendant. In an action to recover this sum and the £1688:

*Held* (reversing the decision of the Court below), that the defendant was not liable for anything beyond the £1688, there being no implied promise by a principal to his agent to indemnify him for loss caused, not by reason of his having entered into the contracts which he was authorized to enter into by the principal, but by reason of his own insolvency: *Duncan v. Hill*, Ex. (Ex. Ch.,) vol. viii., 242.

## ASSIGNMENT OF ALL DEBTOR'S PROPERTY.

On the 6th of June, 1871, G., a dealer in oil, borrowed £400 of N., his brother-in-law, the money to be re-paid in a month. The money not having been repaid when due, N. pressed for it, and ultimately placed the matter in the hands of his solicitors, who gave G. till the end of July to pay. On the 1st of August G. asked N. for further time, and N. said he must have a speedy settlement or he should take proceedings. G. said he would do what he could during the week. On the 5th of August he went to N. and said he had no money, but that he had some oil, and that if N. could induce a firm of B. & Co., in which he had formerly been a partner, to buy it, he should be paid out of the proceeds. N. went to B. and explained the circumstances to him, and ultimately B. consented to treat with G. G. then went to B., and in the result, a contract was entered into by B., on behalf of his firm, to buy fourteen casks of oil from G. At this time, G. had, in fact, no oil, but on the 9th of August, he ordered fourteen casks from W. on credit, and this oil was by G.'s direction sent to B. & Co. G. never paid for it, and had no means of doing so when he ordered it. On the 15th of August, G. called at the warehouse of B. & Co. to settle the purchase, and by his order B. & Co. paid to N. the amount of his loan and interest, and paid the balance of the price of the oil to G. On the 6th of April, 1872, G. was adjudicated a bankrupt, the act of bankruptcy being the filing of a petition for liquidation on the 7th of March. The trustee afterwards applied to the County Court to set aside the payment of the £400 to N. as a fraudulent preference and an act of bankruptcy. The case was tried by a jury, who found that when the transaction took place the oil was substantially the whole of the bankrupt's property; that to the knowledge of N. he was insolvent: and that the transfer was not made *bona fide*, but fraudulently without pressure, with a view of giving N. a preference over the other creditors of G.

The judge thereupon *held*, that the transaction was void as an act of bankruptcy, and a fraudulent preference, and ordered N. to pay to the trustee the sum which he had received.

On appeal, *held*, that the purchase of the oil was a *bona fide* transaction in the ordinary course of trade, and that N. was a payee in good faith, and for valuable consideration; that there was no act of bankruptcy and no fraudulent preference.

The order of the County Court Judge was, therefore, discharged.

The proviso in section 92 of the Bankruptcy Act, 1869, in favor of a purchaser, payee, or incumbrancer, in good faith and for valuable consideration, extends to a case where the consideration is the payment of a pre-existing debt.

The court may disregard the finding of a jury if it sees that it is inconsistent with the evidence, and need not direct a new trial to take place: *Ex parte Norton; In re Golden*; C. J. B., (Eq. cases), vol. xvi., 397.

## BILL OF EXCHANGE.

*Acceptance—What it Admits—Estoppel—Unauthorized Indorsement by one of two Partners.* B., a member of the firm of W. & B., attorneys and solicitors, drew and indorsed for value to the plaintiff in the partnership name, a bill of exchange, payable to the order of W. & B., which the defendant accepted without consideration. The indorsement was in respect of an entirely private matter of business between B. and the plaintiff, unconnected with partnership purposes; B. had no authority from W. either to draw or indorse the bill. In an action by the indorsee against the acceptor, the defendant having traversed the indorsement:

*Held*, that the defendant was not estopped from showing that there had been no indorsement in fact by the firm: *Garland v. Jacomb, Ex.*, (Ex. Ch.), vol. viii., 216.

# BUILDING CONTRACT.

The engineer of a railway company prepared a specification of the works on a proposed railway, and certain contractors fixed prices to the several items in the specification, and offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day at a sum equal to the sum total above mentioned. If the contractors failed to proceed with the works, the company might take possession and proceed with them; in which case a valuation should be made by the engineer, or, if either party required it, by arbitration. The contract contained provisions making the certificate of the engineer conclusive between the parties, and it was provided that all accounts relating to the contract should be submitted to and settled by the engineer; and that his certificate for the ultimate balance should be final and conclusive; it was further provided that all questions, except such as were to be determined by the engineer, were to be referred to arbitration.

The railway was completed and the engineer gave his final certificate as to the balance due to the contractor.

The contractors had assigned their interest in the contract to trustees on trust for their creditors and for themselves, in certain proportions.

The contractors filed a bill against the company, making claims on several grounds, and praying an account and payment:

*Held*, that the contractors could not, on mere verbal promises by the engineer, maintain against the company a claim to be paid sums beyond the sums specified in the contract under seal:

*Held*, that, although the amount of the works to be executed might have been understated in the engineer's specification, the contractors could not, under the circumstances, maintain any claim against the company on that ground:

*Held*, that, in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties:

*Held*, that one of several *caveats que trust*, could not, on an allegation that the trustees refused to take proceedings, maintain a suit against a debtor to the trust estate.

Where a contract has provided that the certificate of the engineer or of an arbitrator shall be a condition precedent to payment, the Court does not obtain jurisdiction because of the power to refer to arbitration.

*Per Lord Romilly, M. R.*: Mere allegations of fraud without facts, from which fraud will be inferred are not sufficient to avoid a demurrer.

Order of the Master of the Rolls affirmed: *Sharpe v. San Paulo Railway Company*, L. J.J., (Ch. Ap.) vol. viii, 597.

by *Perils of the Sea without Default of Ship*-party from Riga to London, provided that cargo of lath-wood, and deliver the same on or about 31st. There was the usual exception and half on arrival, and the remainder on

Part of the cargo, loaded in accordance of the sea, without any default of the master

*Held*, that the ship-owner was, on delivery of the remainder of the cargo, entitled to the full sum: *Robinson v Knights*, C. P. vol. viii, 465.

#### CONDITION.

If the directors of a railway company become, for the purposes of the company, lessees of land, with a privilege to use docks, and agree to pay rent and royalties to the owner of the docks, and enter into other conditions which, by a state of circumstances subsequently created, appear to be unreasonable and impolitic, such stipulations and conditions can not, on that account, be treated as *ultra vires* of the directors.

Nor can a condition to pay shipping dues, not only for goods actually brought along the railway and shipped at those docks, but for goods brought along the railway to be shipped at other docks, be treated as a covenant in restraint of trade: *Taff Vale Railway Company v. Macnabb*, (House of Lords, Eng. and I. Appeals,) vol. vi 169.

#### CONDITIONS OF SALE.

*Vendor and Purchaser—Power to rescind.* The defendant, in March, 1868, (as surviving devisee in trust), sold by auction to the plaintiff's testator land and tolls (lots 3 and 4) under certain conditions. Condition 3 provided that the vendors were to deliver to the purchaser an abstract of title within seven days from the sale, the purchaser was to make his objections and requisitions within twenty-one days of the delivery of the abstract, and all objections and requisitions not made within that time, were to be taken to be waived; "and, in case any purchaser shall make any objection or requisition on the title of the respective lots, which the vendors shall be unwilling or unable to answer or comply with, the vendors reserve to themselves the option, notwithstanding they may have attempted to answer or comply with such objections or requisitions, or may have partly done so, at any time to rescind the contract for sale of the lot or lots, in respect of which such objections or requisitions shall be made, upon repaying or tendering to such purchaser or purchasers the deposit money, without interest, costs, or expenses, in full of all claims or demands for the investigation of title or otherwise." An abstract was delivered, on which the purchaser made and insisted on two objections, of which one (as to lot 3) was frivolous, and the other (as to lot 4) was an objection as to quantity, in respect of which he was, under another condition, only entitled to compensation, which was offered. The defendant thereupon, on the 24th of July, filed a bill in Chancery for specific performance, and the purchaser, on the 23rd of September, put in an answer, in which he reiterated his objections, and also objected to complete on the ground of certain transactions affecting lot 4 which had not been disclosed by the abstract. These transactions were known to the vendor at the time of the sale, and were intentionally, but *bona fide* omitted from the abstract, as it was supposed they did not affect the title. The contents of the deeds, relating to these transactions, were first communicated to the plaintiff by an affidavit, made by the defendant in this action under an order for discovery; but the deeds were previously known to his attorney, who had been a clerk in the office where they were prepared. On the 2nd of December, the purchaser died; on the 26th of January, 1869, the vendor's solicitor wrote to the solicitor of the purchaser, requesting particulars of the probate of his will; and, on the 12th of February, the vendor (the now defendant) announced his intention to rescind, and afterwards formally rescinded the contract, and tendered the deposit. An order was made in the suit that the defendant, the plaintiff in the suit, should revive it, or that the bill should be dismissed without costs, and the suit

not being revived, the bill was dismissed accordingly. In an action brought by the plaintiff against the defendant for not deducing a good title, and for fraudulently representing that he had, and would deduce a good title, the arbitrator, to whom the facts were referred, having negatived fraud:

*Held* by the court below (Kelly, C.B., Martin, B., and Cleasby, B.; Bramwell, B., dissenting), that the defendant was entitled to rescind. Error being brought:

*Held* by the Court of Exchequer Chamber (Blackburn, Keating, Brett, Archibald, and Honyman, JJ., Grove, J., dissenting), that the defendant had, by filing his bill, elected not to rescind on any of the original objections, but that the third condition applied to all objections to the title, whether appearing on the abstract or not; that the defendant was, therefore, entitled to rescind on account of the objection as to lot 4 raised by the answer, and founded on the transactions, which were omitted from the abstract; and that the delay from the filing of the answer on the 23rd of September, 1868, to the 12th of February, 1869, was not unreasonable. *Quære* whether, if an action had been brought against the defendant for breach of his contract to deliver a true abstract, the plaintiff could, under the circumstances, have recovered substantial damages: *Gray v. Fowler*, vol. viii, Ex. (Ex. Ch.), 249.

#### CUSTOM OF TRADE.

*Written Contract—Evidence of Trade Usage—Charter-party—Principal and Agent.* The defendants, acting as agents for one L., chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charter-party was expressed to be made and was signed by the defendants, as "agents to merchants," the name of the principal not being disclosed:

*Held*, on the authority of *Humphrey v. Dale*, (E. B. & E., 1004; 27 L. J. (Q. B.) 390) and *Fleet v. Murton* (Law Rep. 7 Q. B. 126), that evidence was admissible in an action by the ship-owners against the defendants upon the charter-party, of a trade usage, by which, if the name of the principal is not disclosed within a reasonable time, the agents themselves are personally liable: *Hutchinson v. Tatham*, C. P., vol. viii, 482.

#### CY-PRES.

Certain charitable trusts declared a century or two ago, in favor of poor prisoners in the city of London, having lapsed by reason of the abolition of the law of imprisonment for debt, and the closing of debtors' prisons, the Attorney-General by a scheme proposed that all the funds should be treated as one charity, and applied to the building, establishment, and maintenance of a school for children of persons convicted of crime, and undergoing sentence:

*Held*, upon the construction of the bequests, that by "poor prisoners" were meant prisoners for debt, especially the poorest and most sickly of such prisoners, and in all cases adults; and that there was no intention to relieve children, or to assist education:

*Held*, consequently, that the proposal did not approach sufficiently near to the charitable intentions of the donors to admit of the funds being applied *cy-pres* in the manner proposed:

*Held*, further, that the proposed scheme would be unnecessary, as contemplating an object already partially or wholly, and better, provided for by the *Industrial Schools Act*; inconsistent with charitable intention, as tending to the relief of the public rates and taxes; and inexpedient, as resulting in the assemblage together in one establishment of children suffering under a common misfortune, and thus perpetuating the memory of that misfortune: *In re Prison Charities*, V.-C. B., (Eq. Cas.) vol. xvi., 129.

## DIRECTOR.

A director of a joint stock company is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company.

So, if, acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company.

Where the articles of a joint stock association declared that if a director had any interest in a contract proposed for acceptance by the association, he should declare his interest, or his place as director should be vacated, and that having declared it he should not vote on the proposal:

*Held*, first, that "declare his interest" meant declare the nature of his interest, and that the words were not satisfied by a mere declaration that he had an interest in the matter:

And, secondly, that the vacating of the seat would not prevent the contract itself from being treated as one made for the benefit of the association, for that the rule of equity would apply to such a case in addition to the penalty specially mentioned by the article of association.

In a joint stock association created for the purpose of carrying into effect loans and other financial operations, C. (who carried on business as a stockbroker), was a director. An article of the association required that if a director "contracts with the company, or is concerned in, or participates in the profits of any contract with the company, or participates in the profits of any work done for the company, without declaring his interest at the meeting of directors at which such contract is determined on, or work ordered," his office of director should be vacated. The article further required that he should not vote on such contract or work. C. had entered into an arrangement with P. to "place" the debentures of a railway company for a commission of 5 per cent. C., at a meeting of the directors, without mentioning his arrangement with P., but merely declaring that he had an interest in the transaction, proposed to the association that it should undertake to "place" these debentures at a commission of 1½ per cent. The proposal was adopted, and debentures to a very large amount, were "placed" by the association:

*Held*, that C. was liable to account to the association for the difference between the two amounts of commission, so far as concerned the debentures which had been actually placed by the association.

C. had a partner, K., who was not in any way connected with the association; the transaction, however, had been a partnership transaction:

*Held*, that the partners were liable, jointly and severally, to make good to the association the profits of which it ought to have received in the increased amount of the commission: *Imperial Mercantile Credit Company v. Coleman & Knight*, (House of Lords, Eng. and I. Appeals), vol. vi, 189.

## ELECTION.

After a lady, who had married during her minority, had come of age, a settlement was executed in the year 1850 to which her father was a party, by which, after reciting that on the treaty for the marriage it had been agreed that certain sums of stock belong to the husband, and a reversionary interest belonging to the wife, should be settled upon the trusts thereafter mentioned, and that the wife's father had agreed to transfer certain bank shares to the trustees, to be held upon the trusts thereafter mentioned; and reciting the transfer of the sums of stock and the bank shares to the trustees, trusts were declared as to the sums of stock for the husband for life, and then for the wife for her life; and as to the bank shares,

during the joint lives of the husband and wife, to pay half the income to the husband and the other half to the wife for her separate use; and after the decease of either to pay the whole income to the survivor for life, and, subject to the above life interests, the sums of stock and bank shares were to be upon the trusts therein mentioned for the children of the marriage. By another witnessing part the husband and wife purported to assign the wife's reversion to the trustees, to be held, when it came into possession, on the same trusts as the bank shares. In 1865 the marriage was dissolved by a decree of the Divorce Court. In 1871 the wife's reversion fell into possession, and she filed a bill to establish that she was not put to her election under the settlement, and to have the fund transferred to her:

*Held* (reversing the decision of the Master of the Rolls), that the wife was put to her election between the interests provided for her by the settlement and her right to receive this fund free from the settlement:

*Held*, further, that in the event of her electing to take against the settlement, she was bound to account for all income received under it since the date of the order nisi for dissolution, and that the parties disappointed by her election had a lien on the fund for what she had so received; but that she was not liable to account for income received during the coverture:

*Campbell v. Ingilby*, (1) considered. (21 Beav., 567; 1 De. G. & J., 393), *Codington v. Lindsley*, L. C. & L. JJ., (Ch. Ap.,) vol. viii, 578.

#### EQUITY.

Where, in the making of an agreement between two parties, there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favor of interposing to grant relief.

The Court of Equity will not, if such a ground for relief is clearly established, decline to grant relief merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition.

What is the nature of a mistake and what has been the cause of it will be considered in determining whether relief ought to be granted. The rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case, it is not decisively a ground for refusing relief.

Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed: *Earl Beauchamp v. Winn*, (House of Lords, Eng. & I. Appeals,) vol. vi, 223.

#### EVIDENCE OF NO SETTLEMENT.

The Court will accept as evidence that there was no settlement on the marriage of a woman resident abroad on affidavit by a solicitor, disclosing facts which make it unlikely that there was a settlement, and stating positively that he was told by the lady and her husband that there was none: *Woodward v. Pratt*, V.-C. M., (Eq. cases,) vol. xvi, 127.

#### EVIDENCE.

At the trial of an action under 9 & 10 Vict. c. 93, brought for the benefit of the mother, widow and children of R., claiming damages from the defendants for having, by their negligence, caused the death of R., it was proved that the deceased

was under a covenant to pay his mother an annuity of 200*l.* during their joint lives. A witness was then called for the plaintiff, who stated that he was an "accountant," and that he had personal experience as to the mode in which insurance business was conducted. He gave evidence, after referring to certain tables used by insurance offices called the "Carlisle Tables," as to the average duration of life of two persons of the ages of the mother and son respectively, and as to the price for which an annuity for the mother's life could be bought. The admissibility of this evidence was objected to by the defendants, and was ruled to be admissible. In summing up, the learned judge directed the jury that they might, if they thought proper, calculate the mother's damages by ascertaining what was the sum which would purchase an annuity of 200*l.* for a person of her age, according to the average duration of human life; and that in calculating the widow's and children's damages, they might, if they thought proper, take as a guide the period of the probable duration of life of a person of the age of the deceased. On the argument of a bill of exceptions tendered to the ruling of the learned judge in admitting the evidence and to his direction to the jury:

*Held*, first (by Blackburn, Keating, Grove, and Archibald, JJ.), that the witness was competent to give evidence as to the probable duration of life and the price of the annuity, although not an actuary; and (Brett, J., dissenting), that the evidence was relevant and properly admitted. Secondly, by the whole Court, that the direction to the jury as to the calculation of the mother's damages was wrong. By Blackburn, Keating, Grove, Archibald, and Honyman, JJ. The direction was erroneous in noticing the circumstance that the annuity of the mother was on the joint lives of herself and her son, and that it was only secured by the personal covenant of her son.—By Honyman, J. The direction was also erroneous in authorizing the jury to find the term for which an annuity is to be purchased, solely by reference to the average duration of life, without taking into account the state of health of the particular annuitant.—By Brett, J. The only legal direction to the jury would have been that they ought not to attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they considered, under all the circumstances, a fair compensation; and the direction was, therefore erroneous, inasmuch as it left it open to the jury to give as damages the utmost amount which they might think was an equivalent for the pecuniary mischief done. Thirdly (by Blackburn, Keating, Grove and Archibald, JJ., Brett, J., dissenting), that the direction as to the mode of calculating the damages, recoverable by the widow and children might be construed as meaning that the probable duration of life of a person of the same age and in the same circumstances as the deceased, was an element to be taken into the calculation of the jury with the rest of the evidence, and being so construed was correct: *Rowley v. London and North Western Railway Company*, Ex. (Ex. Ch.) vol. viii, 221.

#### EXECUTION CREDITOR.

P. recovered judgment for a sum exceeding £50 from a trader, and on the 8th of August lodged an execution in the hands of the sheriff, who seized six of his horses.

On the 11th of August, before any sale had been made by the sheriff, the debtor agreed with P. to sell him the six horses which the sheriff had seized for the amount of the debt and the sheriff's charges; and P. accordingly withdrew the execution, but he left the horses in the debtor's stables, and signed an agreement to let the debtor have the use of them for a certain payment per day.

On the 15th of August P. removed the horses, and soon afterwards sold them for about the same price as he gave for them. The debtor was, at the time of the sale,

insolvent, and on the 15th of August he filed a petition for liquidation, and trustees were appointed, who claimed the prices of the horses from P.:

*Held*, (affirming the decision of the Chief Judge), that the sale of the horses to the execution creditor, having been made for the purpose of avoiding a sale by the sheriff, was a fraudulent transfer under the 2nd sub-section of the 6th section of the *Bankruptcy Act*, 1869, and was void against the creditors.

But, *semble*, it would not have been fraudulent if the debtor had been solvent.

*Held*, also, by James, L.J. (*dissentiente* Mellish, L.J.), that the seizure by the sheriff, followed by the sale by the debtor to the creditor, constituted a seizure and sale within the 5th sub-section of the 6th section, and an act of bankruptcy:

*Held*, also, by James, L.J. (*dubitante* Mellish, L.J.), that the sale was a fraudulent preference of the creditor: *Ex parte Pearson*; *in re Mortimor*, L. J.J., vol. viii., 667, (Ch. Ap.)

#### EXECUTOR—*Liability of.*

One of three executors having employed in proving the will the solicitor who was employed by the testatrix in making it, also employed the same solicitor to negotiate for the compromise of a debt due from the estate. The executor and creditor were both living in *London*. In June, 1872, the solicitor wrote to the executor, informing him that a compromise had been effected of this particular debt for £260, and of another debt for £50, and asking for a cheque. The executor, on the 4th of July, sent a cheque for £310 to the solicitor, who paid it in to his own account.

The compromise, in fact, had not been effected, and the money was misappropriated; but the executor, having taken no step in the meantime, did not find out the loss until December, 1872:

*Held*, that the £310 ought to be allowed to the executor: *In re Bird*; *Oriental Commercial Bank v. Savin*, V.-C. B., vol. xvi, 203, (Ex. cases.)

#### FORBEARANCE OF BUYER AT SELLER'S REQUEST.

A manufacturer of iron contracted, in May, 1871, to sell to a company 150 tons of iron at a specified price per ton, delivery to be twenty tons per month. The deliveries were not duly made under the contract. In January, 1872, the vendor filed a petition for liquidation by arrangement. At that time a considerable quantity of iron remained to be delivered, and the market price of iron had risen very much. It appeared that in some cases the company had bought iron in the market to supply the deficiency in the monthly deliveries. It did not appear that any actual request had been made by the vendor for the postponement of the deliveries:

*Held*, that the company could prove in the liquidation only for the differences between the contract price of the iron and the market prices of the days when the respective deficient deliveries were made:

*Ogle v. Earl Vane* (Law Rep. 2 Q. B., 275), distinguished: *Ex parte Llansamle-Tin Plate Company*; *in re Voss*, C. J. B., vol. xvi, 155, (Eq. cases.)

#### FOREIGN SOVEREIGN.

*Jurisdiction of the Court to entertain a Suit of Damage instituted against a Vessel belonging to the Khedive of Egypt—Sovereign Prince—Maritime Lien—Proceedings in Rem—Waiver of Privilege.* In a cause of damage instituted by the owners, master, and crew of the *Batavier* against the vessel *Charkieh* and her freight, an appearance under protest was entered on behalf of His Highness the Khedive of Egypt and his Minister of Marine. A petition on protest was filed on their behalf, stating that the *Charkieh* was the property of the Khedive as reigning sovereign of the state of Egypt, and a public vessel of the government and semi-sovereign state of Egypt, and

concluding with a prayer to the Court to declare that the vessel was not liable to arrest. It appeared, from the answer filed on behalf of the plaintiffs, and from evidence which was adduced at the hearing of the petition on protest, that the *Char-kieh*, though carrying the flag of the Ottoman navy, had come with cargo to England and had been entered at the Customs like an ordinary merchant ship, and that, at the time of the collision, which happened in the Thames, she was under charter to a British subject, and was advertised to carry cargo to Alexandria: The Court held that the Khedive was not entitled to the privilege of a sovereign prince, and pronounced against the protest: *Semble*, that a suit *in rem* to enforce a damage lien may be entertained without any violation of international law, though the owner of the *res* be the sovereign of a foreign state, and that such a suit may possibly be entertained even against property connected with the *jus coronæ*: *Semble*, that if a sovereign assumes the character of a trader, and sends a vessel belonging to him to this country to trade here, he must be considered to have waived any privilege which might otherwise attach to the vessel as the property of a sovereign: *The Char-kieh*, (Admiralty and Ecclesiastical), vol. iv, 59.

#### FRAUDULENT CONVEYANCES.

A trader, being in insolvent circumstances, applied to a creditor, to whom he owed £2500 for goods supplied in the way of his business, to supply him with more goods on credit. The creditor refused to supply any more goods unless the debtor paid £200 on account of the goods previously supplied. The debtor said he could not pay the money, and on being pressed by the creditor, he offered to return goods to the amount of the £200, which he did not want. This the creditor agreed to, and the goods were accordingly returned to him. On the same day the debtor filed a petition for liquidation:—

*Held* (reversing the decision of Bacon, C. J.), that the delivery of the goods to the creditor was not a fraudulent preference.

*Ex parte Blackburn* (Law Rep. 12 Eq., 358) approved.

*Held*, also, that the trustee in the liquidation was not entitled to have the goods given up by the creditor, on the ground that the delivery to him was on condition of his supplying fresh goods, which he had never done.

Two of the principal creditors of a debtor had a meeting with him, at which he admitted that unless he could get assistance from his friends, he must become bankrupt:

*Held*, that one of the creditors might, notwithstanding the meeting, obtain payment from the debtor of a debt previously due: *Ex parte Topham; in re Walker*, L.JJ., vol. viii, 614, (Ch. Ap.)

#### GIFT TO BE VESTED AT TWENTY-ONE.

Testatrix gave a legacy of £4000, “payable” at the decease of A. to a class of persons, to be equally divided amongst them, share and share alike, the said shares to be “vested” interest on majority or marriage, and the income, in the event of A.’s death in the meantime, to be paid towards the maintenance and education of such persons. There was no gift over. Two of the class survived A., and died under twenty-one:

*Held*, that by the word “vested” was meant “vested in possession,” and that the shares of the deceased minors passed to their legal personal representatives: *Simpson v. Peach*, V.-C. B., vol. xvi, 208, (Eq. Cases.)

### ILLEGAL CONSIDERATION.

A Court of Equity will not, at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such settlement may have been made for an illegal consideration not appearing on the face of the instrument.

A widower, two days before going through the ceremony of marriage with his deceased wife's sister (which ceremony was known to both parties to be invalid), executed a deed, by which it was recited, that he was desirous of making a settlement and provision for the lady, and had transferred certain shares into the names of trustees upon the trusts thereafter declared, being for the separate and inalienable use of the lady during her life, and after her death as she should by deed or will appoint; and they afterwards lived together as man and wife until the widower's death. Ten years after such death, and some time after the lady had married, the legal personal representative of the settlor instituted a suit to set aside the settlement, as being founded on a bad and illegal consideration:

*Held*, that the suit could not be maintained: *Ayerst v. Jenkins*, L. C. for M. R., vol. xvi, 275, (Eq. cases.)

### ILLEGITIMATE CHILD.

A testator gave a fund to trustees to pay the dividends to his daughter for life, and after her decease, to transfer the principal equally amongst all the children of his said daughter, whether by her present putative husband, or by any other person whom she might marry, who should attain twenty-one, their executors, administrators and assigns. But in case his daughter should die, "leaving" no issue, then to the testator's other children.

Long before the date of the will, the testator's daughter was, with the testator's knowledge, living with a gentleman to whom she was afterwards married, and she had one son by that person, who was born four years before the date of the will, and was known by the testator to be illegitimate, and acknowledged by him as his grandson. The daughter being sixty-seven years of age, and having no other child, and her husband being dead:—

*Held*, that the illegitimate son was entitled absolutely to the capital, and the word "leaving" being construed "having," and he being now over twenty-one, the money was ordered to be paid to the mother and son, who petitioned for payment to them jointly: *In re Brown's Trust*, V.-C. M., vol. xvi, 239, (Eq. Cases.)

### INJUNCTION BEFORE BILL FILED.

1. Where, on account of the offices of the Court being closed, the filing of a bill has been delayed, the Court may grant an injunction before bill filed, and direct the bill and affidavit to be filed as on the day when the offices were closed: *Carr v. Morice*, V.-C. M., vol. xvi, 125, (Eq. Cases.)

2. In an urgent case an interim injunction may be granted before bill filed: *Thorneloe v. Skoines*, V.-C. M., *Ib.*, 126.

### MARINE INSURANCE.

1. *Sea Damage to part of goods insured—Consequent depreciation in value of remainder.* A policy of marine insurance was expressed to be "on 1711 packages teas, valued at the sum insured, viz, \$31,000," and contained a special warranty in the following terms, viz.: "warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by

actual contact of sea-water with the articles damaged occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise, and the same practice shall obtain as to all other merchandizes, so far as practicable." The ship met with bad weather and shipped large quantities of sea-water, by contact with which 449 packages of the tea insured were greatly injured. When teas are sold they are usually sold in the order of the consecutive numbers marked on the packages, and if the numbers be broken by some being omitted, or if some of the chests be marked as damaged, a suspicion is created that the other packages may be damaged, and they do not command such high prices as if none of the shipment had been damaged. In consequence of this, the remaining 1262 packages, which had not been in contact with sea-water, sold for less than they would otherwise have fetched.

*Held*, that the assured could only recover in respect of the damage occasioned to the packages, which had been actually in contact with sea-water, and not in respect of the loss occasioned by injury to the reputation of the remainder; and, *semble*, that the effect would have been the same even in the absence of the special warranty: *Cator v. The Great Wes. Ins. Co. of N. Y., C. P.*, vol. viii, 552.

2. *Loss of Freight—Right of Charterer to throw up Charter-party where Vessel disabled.* The plaintiff, on the 9th of November, 1871, effected an insurance "on chartered freight valued at 2900*l.*, at and from Liverpool to Newport in tow, whilst there, and thence to San Francisco," etc. The ship left Liverpool on the 2nd of January, 1872, and on the 4th, before arriving at Newport, took the rocks in Carnarvon Bay. She was got off much damaged, and returned to Liverpool on the 12th of April, where she was sold under circumstances which the Court held not to be justifiable; there being no satisfactory evidence of a constructive total loss. She was repaired by the purchaser, and was still under repair at the time of the trial, the 16th of April, 1872. By the charter-party the vessel was to proceed with all convenient speed (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. After the vessel took the rocks, and before she was got off, viz., on the 15th of February, the charterers threw up the charter, and on the following day, they hired another ship to carry the rails (which were wanted for the construction of a railway) to San Francisco. The plaintiffs sued the underwriters for a loss of the chartered freight. The jury found that the time necessary for getting the ship off and repairing her, was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, and so long as to put an end in a commercial sense to the commercial speculation entered upon by the ship-owner and the charterers:

*Held*, by Keating and Brett, JJ., that the charterers were absolved from loading the vessel, and that the ship-owner therefore might recover for the loss of freight:

*Held*, contra, per Bovill, C. J., that the charterers were not entitled to throw up the charter, and that consequently the plaintiff could not recover against the underwriters, and that the findings of the jury were immaterial: *Jackson v. The Union Marine Insurance Company, Limited, C. P.*, vol. viii, 572.

3. *Description of Voyage—Overland Transit—Hostile Detention of Goods in a besieged Town a "Restraint of Princes"—Abandonment—Total Loss.* A marine policy may cover the risks during a portion of the transit to be performed overland, provided apt language be employed to express that intention.

The hostile detention of goods, within a besieged city or town, is a "restraint of princes;" a "siege" and a "blockade" standing upon the same footing in this respect.

In a policy of insurance the course of the voyage was thus described: "At and from Japan, and [or] Shanghai to Marseilles, and [or] Leghorn, and [or] London via Marseilles, and [or] Southampton, and whilst remaining there for transit, with leave to call at any ports or places in or out of the way for all purposes, including all risks of craft to and from the steamers, etc., upon any kind of goods, etc., in the good ship or vessel called the ——— steamers or steamer, per overland, or via Suez Canal," etc. The risks insured against were, amongst others, "of the seas, men of war, enemies, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people," etc. In the margin of the policy was the following memorandum: "It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Imperiales steamers, and [or] the steamers of the Mercantile Trading Company of Liverpool only."

The goods insured (silks) were carried from Shanghai to Hong Kong in a steamer belonging to the Messageries Imperiales, and were there transhipped into another steamer of the same company and carried through the Suez Canal to Marseilles—this being the ordinary course of business of that company in carrying goods from Shanghai to Marseilles. Goods are carried by the Messageries Imperiales at through rates from Shanghai to London; and the freight upon the silks in question was paid to that company for the whole journey.

At the time of effecting the policy, the steamers of the Messageries Imperiales ran from the East to Marseilles, and no further. Goods were never, in the ordinary course of business, carried from China, Japan, or India to London via Marseilles, except by the Messageries Imperiales, and that company always sent such goods overland through France—by the Lyons railway from Marseilles to Paris, and thence by the Northern railway to Boulogne, and thence to London; and this course of business was well known among underwriters. The silks in question, having reached Marseilles, were forwarded by the Lyons railway to Paris, on the 3rd of September, 1870, and arrived at the Paris station on the 13th. At this time the German armies had invaded and occupied a large part of France, and were advancing upon Paris, which they had completely surrounded and besieged by the 19th, preventing all communication between Paris and all other places, so that it was impossible to remove the silks from Paris. This state of things continued until (and long after) the 7th of October, on which last-mentioned day the assured gave notice of abandonment. After the commencement of this action the silks were forwarded to London; and they arrived there in an undamaged state on the 20th of March, 1871. Upon a special case setting forth the above facts, the Court to draw inferences:

*Held*, first, that the policy covered the whole journey from Shanghai to London, including the overland transit from Marseilles to Boulogne; Secondly, that the detention of the silks in Paris by reason of the state of siege was a "restraint of princes" within the meaning of the policy; and, consequently, that the goods being lost to the assured for an indefinite time, they were entitled to abandon, and to recover against the underwriters as for a total loss: *Rodocanachi v. Elliott*, C. P., vol. viii, 649.

4. *Insurable Interest—Extent of Right of Consignees (under Advances) to Insure and recover in their own Names* The plaintiffs, merchants in London, were in the habit of receiving consignments of cotton from correspondents abroad, and amongst others from Bell & Co., of Bombay, making advances thereon by acceptances against the consignments. For the purpose of covering these consignments and their advances, the plaintiffs effected open floating policies with the defendants, an insurance company, expressing that the insurances were made by them "as well in their own names as for and in the name or names of all and every person and persons to

whom the same doth, may, or shall appertain, in part or in all." Each of the policies so effected was for 5000*l.* "on cotton, etc., from Bombay to London," etc., "by ship or ships;" and, as the plaintiffs received advices of the shipments, they declared upon the policies, in the usual way, the particulars and value of the goods and names of the vessels by which they were shipped. On the 29th of April, 1870, Bell & Co. advised the plaintiffs of the shipment of 250 bales of cotton on board the Aurora, and of their having drawn upon them for 3000*l.*, at six months' sight, on account of that shipment, and requesting them to insure the cotton. This bill was negotiated by Bell & Co., through the National Bank of India, with whom the shipping documents were lodged as security. The bill, with the shipping documents annexed, was transmitted by the bank to their manager in London, and on the 21st of May the plaintiffs accepted it "against delivery of shipping documents" for the cotton. With the assent of the National Bank, the 250 bales of cotton per Aurora, valued at 5000*l.*, were, on the 23d of May declared by the plaintiffs (who thereby intended to insure for Bell & Co. and themselves) upon two open policies which they then had running with the defendants; and the plaintiffs wrote to the bank undertaking "to hold the amount insured at their disposal until payment of their acceptance for 3000*l.*, due 24th November." The Aurora left Bombay with the cotton on board, and was lost at sea on the 11th of June. The plaintiffs afterwards paid their acceptance and received the bill of lading for the cotton. In an action upon the policies to recover for the loss of the goods, the declaration averred that the plaintiffs caused themselves to be insured, that they or some or one of them were or was interested in the goods to the amount of all the moneys by them insured thereon, and that the insurances were made for the use and benefit and on account of the person or persons so interested. The defendants traversed these allegations:

*Held*, by the whole Court, that the plaintiffs were entitled to recover upon these policies to the extent of their advance.

*And, held*, by Bovill, C. J., and Denman, J. (the Court being by agreement at liberty to draw inferences of fact), that the plaintiffs had an equitable interest in every part of the cotton as security for their liability under their acceptance, and, being also consignees to manage the consignment, they were entitled to insure the whole of it in their own names, and to its full value, and that, having intended by the insurances to cover the interests of all parties in the cotton, they were entitled to recover the whole amount upon a declaration averring interest in themselves; and that they would hold any surplus beyond their advance, as trustees for the other parties beneficially interested; and that their right to insure and recover was not limited to their own beneficial interest in the goods.

*Held*, contra, by Keating and Brett, JJ., that the plaintiffs were not entitled to recover under these policies, in their own names, anything beyond their actual advance,—the only interest they had in the cotton being a right by an existing contract to have the bill of lading indorsed to them on payment of their acceptance, so as to enable them to sell the cotton to pay themselves 3000*l.* and their expenses, and to earn their commission, and to hold the surplus proceeds as agents for the consignors; and they being at the time of the loss neither legal owners of the cotton nor in equity trustees as to the surplus for the consignors: *Ebsworth v. Alliance Marine Insurance Company*, C. P., vol. viii, 596.

#### MASTER AND SERVANT.

*Liability of Master for Negligence of his Servant—Scope of Employment.* A stevedore employed to ship iron rails had a foreman, whose duty it was (assisted by laborers) to carry the rails from the quay to the ship after the carman had brought

them to the quay, and unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one fell upon and injured the plaintiff, who was passing by:

*Held* (per Grove and Denman, JJ., Brett, J., dissenting), that there was evidence for the jury, that the foreman was acting within the scope of his employment, so as to render the stevedore responsible for his acts: *Burns v. Ponsom*, C. P., vol. viii, 563.

#### MEASURE OF DAMAGES.

*Contract in the Alternative—Judgment by Default.* The declaration stated that the plaintiff having shipped certain goods to a place abroad, drew against the shipment, and entrusted the drafts to the defendant for presentment, for reward to the defendant, on the terms that the defendant should return the drafts if not paid after acceptance to the plaintiff, or pay the plaintiff the amount of them; that all conditions were performed, etc., necessary to entitle the plaintiff to a return of the drafts, or to payment of the amount of them, yet the defendant did not return the drafts, nor pay the amount of them. Judgment was signed for want of a plea:

*Held*, (per Keating, Brett, and Grove, JJ., Bovill, C. J., dissenting), that the damages on the contract alleged in the declaration must be the amount of the bills.

Per Bovill, C. J.: The contract, as alleged in the declaration, being a contract in the alternative, it might be performed by performance of either branch of the alternative at the election of the defendant, and therefore the damages might be the value of the bills, if of less value than the amount for which they were drawn: *Deverill v. Burnell*, C. P., vol. viii, 475.

#### MISDESCRIPTION IN WILL.

Testatrix devised "all that my share and interest in the lands known by the name of D., situate in the parish of K., now in the occupation of E."

The lands known as D. included two small closes in the parish of L., but only accessible from the rest of the lands, which were in the parish of K.; also one close formerly in the same occupation as the other land, but at the date of the will and the death of the testatrix occupied by M. There was no residuary devise:

*Held*, that these three closes passed under the devise: *Hardwick v. Hardwick*, L. C. for M. R., vol. xvi., 168, Eq. Cases.

#### MORTGAGE BY DEPOSIT.

The relief to which an equitable mortgagee by deposit is entitled is foreclosure, not sale: *Pryce v. Bury*, (Law Rep., 16 Eq., 153, n.) followed: *James v. James*, L. J. J., for V.-C. W., vol. xvi., 153, (Eq. Cases.)

#### NEGOTIABLE INSTRUMENT.

*Debenture payable to Bearer—Promissory Note—Custom.* In May, 1869, the defendants, a limited company registered under the Act of 1862, sold to M. a document under the seal of the company and signed by two directors and the secretary. It was numbered and headed with the name of the company, and called "Debenture," and proceeded, "The company hereby promise, subject to the conditions indorsed on this debenture, to pay to the bearer 100*l.* on the 1st of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off according to the conditions, and interest at 8 per cent. on the 1st of November and the 1st of May in each year; and also a further sum of 10*l.* by way of interest or bonus at the same time as the principal sum is paid off. In witness whereof the common seal of the company

has been affixed this 9th of May, 1869." By the conditions indorsed a certain number of the bonds were to be drawn for twenty-one days before the days for the payment of the half-yearly interest, and any bond drawn was to be advertised and paid off with the interest and bonus due, the bond being given up and no further interest being payable. In July, 1869, the bond was stolen from M. In October, 1871, the number of the bond was drawn. At the end of 1871 the plaintiff purchased the debenture from S., who had since absconded. The defendants having notice of the robbery refused to pay the debenture to the plaintiff, and he brought an action in his own name, alleging that he was lawful bearer of the debenture. At the trial it was admitted that similar documents had been treated as negotiable; it was also admitted that the plaintiff derived title from the thief; but the jury found that the plaintiff had given value for the debenture without notice:

*Held*, first, that the contract contained in the conditions prevented the debenture from being a promissory note, even if it had been under hand only; secondly, that it was not competent to the defendants to attach the incident of negotiability to such instruments, contrary to the general law; and that the custom to treat them as negotiable, being of recent origin and not the law merchant, made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law. And the plaintiff, therefore, could not recover.

*Quære*, whether an instrument under the seal of a corporation can be a promissory note: *Crouch v. The Credit Foncier of England, Limited* Q. B., vol. viii., 374.

#### PRINCIPAL AND AGENT.

*Undisclosed Foreign Principal—Authority of English Merchant when buying Goods on account of Foreign Constituents—"Purchases" to be made "on joint Account of English and Foreign Firms."* The presumption (whether it be an inference of fact or a conclusion of law), that foreign constituents do not give the English commission merchant any authority to pledge their credit to those from whom the commission merchant buys on their account, applies to a case in which a foreign firm agrees that an English firm shall "purchase" and ship goods "on the joint account" of the two firms. H. F. & Co. were merchants in London, and defendant was a partner in the firm of H. B. & Co., carrying on business at Rangoon. Goods were supplied by plaintiff to H. F. & Co. on their order given in consequence of an arrangement between the two firms, as disclosed in letters, that H. F. & Co. should "purchase" and send out goods "on the joint account" of the two firms, 2 per cent. to be charged on the invoice by the London firm, and 5 per cent. by the Rangoon firm, including guarantee. Plaintiff had no knowledge of defendant, or that the Rangoon firm were in any way interested in the transaction, until after the goods were supplied:

*Held*, that defendant was not, as an undisclosed principal, a party to the contract under which the goods were supplied by plaintiff; for that, on the true construction of the correspondence, the Rangoon firm did not give authority to the London firm to establish privity of contract and pledge their credit with the English suppliers of the goods: *Hutton v. Bulloch*, Q. B., vol. viii., 331.

#### RAILWAY.

1. The directors of a railway company, T., in order to obtain the use of the *B. Docks*, then existing and situated near the end of their line, wherein to ship and unship goods carried along their railway, entered, in 1849, into a contract with the owners of these docks to pay certain dock and lockage dues, and accepted (under the authority of a private Act of Parliament) a lease for 250 years, by which they bound themselves to procure, so far as they could, all goods sent along their railway to or from

ships, to be shipped or unshipped at these docks, and to pay certain dues and royalties in respect of all goods, etc., shipped or unshipped there which had been or should be conveyed "along the railway or any part or branch thereof:"

*Held*, that this only applied to the railway or those parts or branches of it which were in connection with some place of shipment or unshipment.

The T. directors by the same lease also covenanted that when and so often as goods, etc., conveyed along the *T. Railway*, or any part or branch thereof, should be shipped or unshipped in any dock other than the *B. Dock*, the T. directors and their successors should pay to the B. trustees the same dues, etc., in respect thereof, as would have been payable on such goods if shipped or unshipped in the *B. Dock*:

*Held*, that "shipped or unshipped in any other than the *B. Dock*" did not apply to goods carried along a part of the *T. Railway*, and then along any other railway, and shipped at any dock whatever and wherever, but only to docks in connection with the *T. Railway* itself.

*Semble*, that any other construction of the covenant would make it both unreasonable and *ultra vires*.

2. After this lease of 1849 had been made, certain private Acts of Parliament were passed which incorporated another body of persons as the *P. Company*, and authorized the construction by the *P. Company* of a line of railway and of docks; and also authorized the directors of the *P. Company* to grant, and the directors of the *T. Company* to accept, a lease of the new undertaking. The lease was duly executed under the powers of these Acts, and the T. directors thenceforth used the new line and the new docks, and discontinued the use of the *B. Docks*. In an action by the B. trustees upon the covenants in the lease of 1849:

*Held*, that those covenants were not thereby violated; that the *P. Railway and Docks* having been made under Acts of Parliament passed subsequent to the lease, the fact of the F. directors becoming the lessees or assignees of the P. undertaking did not constitute the P. line of railway a "part or a branch" of the *T. Railway*; and that consequently the T. directors were not, by the use of the *P. Railway and Docks*, liable to the B. trustees as for breach of the covenants in the lease of 1849: *Taff Vale Railway Company v. Macnabb*, House of Lords, Eng. and I. Appeals, vol. vi., 160.

#### RAILWAY COMPANY.

*Trustee of Stock for Company—Possession of Certificate by him—Equitable Mortgage thereof in Breach of Trust—Subsequent Notice to Mortgagee—Right to Legal Transfer of the Stock—Registration—Mandamus.* H., a banker, was a director of the defendants' railway company, and he and another director were the registered proprietors of certain shares in the company, which were held by them as trustees for the defendants. No certificates had been issued to them in respect of such shares. The co-director died. The shares were afterwards changed into stock, and H. having converted some of the stock to his own purposes, was called upon to replace it, and did so by purchasing stock to the same amount, and the defendants issued certificates to him representing the amount of the stock. It was customary to issue stock certificates to registered holders of all consolidated stock and never the practice to notice on the face of such certificates that the registered proprietors were trustees. In 1866, R., believing H. to be absolute owner of the stock, lent money to him upon the deposit of the certificates as security, together with a written memorandum, by which H. agreed to execute and deliver upon request a valid mortgage and legal transfer of the stock. No notice of this transaction was given to the defendants. R. died, leaving his widow executrix. On the 12th of February, 1869, the defendants found out the fraud of H., and on the 13th of February, gave notice to the executrix

that H. had been a trustee for them. On the 5th of May, at her request, H. executed a transfer of the stock to her. On the 20th of May, she delivered the deed of transfer and certificate to the company, requiring them to register the transfer and her name as the proprietor of the stock; which they refused to do. The Court of Queen's Bench having refused a peremptory writ of mandamus to compel the registration:

*Held* (reversing the judgment), that the defendants, by issuing and allowing their trustee to possess certificates which imported that the holder had an indefeasible title to the stock, precluded themselves from setting up their right as *cestuis que trust* against the *bona fide* mortgagee without notice, who acted upon the certificates in advancing the loan; and the executrix was entitled to a peremptory mandamus: *The Queen v. Shropshire Union Railway Co.*, Q. B. (Ex. Ch.), vol. viii., 420.

#### REPLEVIN.

*Judgment recovered—Special Damage—Trespass to Land—Mortgagor.* Certain premises were let to the plaintiff by P., who had previously mortgaged them to the defendants, the trustees of a benefit building society, to secure payment of subscriptions, etc., which might become due from him to the society. The mortgage deed gave power to the defendants to distrain the goods of P., on the premises for arrears of subscriptions due to the society, as for rent due on a demise. The defendants distrained on the premises for subscriptions due from P., and seized the plaintiff's goods. The plaintiff replevied the goods, and recovered in the action of replevin, in the County Court, as damages, the amount of the expenses of the replevin bond. Having sustained further consequential damages by reason of the seizure of his goods, he subsequently brought an action of trespass in the superior Court to recover these damages, and also in respect of the trespass to the land:

*Held*, that the judgment in replevin was a bar to the action in respect of trespass to the goods, inasmuch as the special damage was recoverable in the action of replevin. And, with respect to the trespass to the land, that the judgment in replevin was no bar to the action; but that the defendants were entitled to the verdict on a plea of not possessed, inasmuch as they had done no act to recognize the plaintiff as a tenant: *Gibbs v. Cruikshank et al.*, C. P., vol. viii., 454.

#### RIGHT OF PASTURAGE.

*Immemorial Exercise of a Right—Presumption of legal Origin—Misdescription in ancient Documents.* The corporation of a borough had from time immemorial exercised, by actual enjoyment by the free burgesses or by way of receipt of rent or acknowledgment, a right of pasturage for all cattle, sheep, and other commonable animals, levant and couchant within the borough, over lands in the neighborhood of the borough, during a certain season of the year, and there was no evidence that during such season the owners or occupiers of the lands in question, or any other persons, had exercised the right of pasturage over such lands. The corporation had, from the time of Henry VIII, from time to time exercised the right of releasing for valuable consideration their rights of pasturage over portions of the lands subject thereto, still continuing to exercise their rights over the rest as before, without any resistance thereto upon the ground that the release of the part of the land extinguished the right as to all, which would have been the case with a mere right of common. In the releases and other deeds of conveyance made by the corporation in reference to their rights, they had always been described in terms which would be appropriate to rights of common strictly so-called:

*Held* (affirming the decision of the court below), that according to the principle of law, by which a legal origin is, if possible, to be presumed for a long-established practice, it must be presumed that what the corporation was entitled to was "*soli*

restura," or an exclusive right of pasturage over the lands in question, and not a right of common, which would have been extinguished by a release of part of the land, notwithstanding the description of the right as a right of common in a long series of documents: *Johnson v. Barnes*, C. P. (Ex. Ch.), vol. viii, 527.

#### RIGHT OF WAY.

P. was the owner of an inn, the yard of which was approached by a passage over adjoining property of M. P. and M. agreed to alter their boundary, and substitute a new passage for the old one. M., accordingly, in 1854, conveyed to P. a small strip of land reaching across the end of the new passage where it entered the yard, and granted to P., his heirs and assigns, "rights of way at all times and for all purposes along a passage intended to run between the piece of land hereinbefore conveyed and a street called the Tyrrels." By another deed P. released his rights of way over the old passage. The plaintiff was a lessee of the inn and yard under P. The defendants were tenants of M., occupying warehouses on his property, and the bill was filed to prevent the defendants from allowing carts and wagons to remain stationary in the passage in course of loading and unloading, so as to obstruct the access to the yard:

*Held* (affirming the decision of the Master of the Rolls), that the necessity of the business of the defendants did not give them any right to occupy the passage by stationary obstructions when any other person having a right of way required to pass:

*Held*, further, that the right of way was not a right in gross, but was appurtenant to the property occupied by the plaintiff, so that his lease gave him a right to the enjoyment of it.

*Ackroyd v. Smith*, (10 C. B., 164) explained.

The acts of several persons may together constitute a nuisance, which the court will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable: *Thorpe v. Brumfitt*, L. J. J., vol. viii, 650, (Ch. Ap.)

#### SALE OF BUSINESS.

The defendant sold to the plaintiffs his news-agency business for £2500, payable by installments. The first two installments of £500 each were payable at all events, but the payment of the other two of £750 each was contingent on the profits of the business, and in the event of the profits of the business exceeding a certain amount, the defendant was to receive further benefits. The plaintiffs at the same time engaged the defendant to superintend their business, including along with the business sold certain other branches, for five years, at a salary; he undertaking to obey their directions. Within the first year the plaintiffs agreed with a company to discontinue the news-agency business, giving the company the option of continuing such parts of it as the company might elect to continue. The plaintiffs then directed the defendant to discontinue the transmission of news, and the defendant refusing to obey, they filed their bill for an injunction to restrain him from transmitting news, which injunction was granted:

*Held* (reversing the decision of Malins, V.-C.), that, as the purchase-money was to be ascertained by reference to the profits, there was an implied covenant by the plaintiffs that the business should be carried on, and that as the plaintiffs had broken this implied covenant, they were not entitled to restrain the defendant from breaking any other part of the agreement: *Telegraph Despatch and Intelligence Company v. McLean*, L. J. J., vol. viii, 658, (Ch. Ap.)

## STATUTE OF FRAUDS.

A plaint in the County Court stated that the plaintiff had assigned to the defendant the agreement for a lease of certain premises, but it was alleged that there was a parol agreement that part of the premises were to be held by the defendant in trust for the plaintiff. Evidence was given on both sides, but the Judge, being of opinion that actual fraud had not been proved against the defendant, and there being no resulting trust in the assignment, decided that the *Statute of Frauds* was applicable, and dismissed the plaint, without coming to any distinct decision upon the evidence:

*Held*, upon appeal, that the Judge ought to have decided that the *Statute of Frauds* had no application; and the court, upon a consideration of the evidence, decided that the plaintiff was entitled to relief, and reversed the decree: *Booth v. Turle*, V.-C. M., vol. xvi, 182, (Eq. cases.)

## TESTAMENTARY PAPER.

In order to give validity to a declaration of trust of property, it is necessary that the donor or grantor should have absolutely parted with his interest in the property, and has effectually put such interest beyond his own reach.

An unmarried lady, possessed of large property, being under obligations to the plaintiff, a servant, called him one day into her room and showed him a box which, having opened it and put a note inside, she locked and handed to him, telling him to take it into his possession, that it would be of service to him some day, but that he must not open it till after her death. She herself kept the key. She afterwards made her will, whereby she gave the residue of her real and personal estate to the defendant, a stranger in blood. After her death the box was opened and found to contain a paper writing, dated and signed by the testatrix, and addressed to the plaintiff, to the effect that the contents of the box were a deed of gift to the plaintiff of certain real and personal estate therein specified and described. In the box were also found title deeds relating to an estate, M., not mentioned in the paper writing, and some other papers, but nothing answering the description of a deed of gift. After the testatrix's death, there was found by the plaintiff, in an outhouse, to which the testatrix and he alone had access, another paper writing, dated the day after the date of the former paper, and also signed by the testatrix, and addressed to the plaintiff, to the effect that the title deeds of the real property mentioned in the former paper were to be found in a particular repository, to be handed over to him "free, and all expenses to be paid out of the bulk, and writings of M.":

*Held*, that these papers were of a testamentary character, and did not amount to a valid declaration of trust in favor of the plaintiff.

*Richardson v. Richardson* (Law Rep. 3 Eq., 686) and *Morgan v. Malleon* (Law Rep. 10 Eq., 475), observed upon. *Warriner v. Rogers*, V.-C. B., (Equity Cases) vol. xvi, 340.

## TESTAMENTARY SUIT.

*Verdict—New Trial refused—Material Witness convicted of Perjury—Second Application for New Trial—Practice.* In a testamentary suit, the jury, being unable to agree, were discharged without giving a verdict. The question in dispute, the capacity of the deceased, was afterwards referred to a second jury, who found in the affirmative and for the plaintiff. Application was made for a new trial on the ground of the verdict being against the weight of evidence, but it was refused.

Subsequently the plaintiff was convicted of perjury in reference to the evidence he gave in this court in the above suit:

*Held*, that that circumstance was not in itself sufficient to justify the court in allowing a new trial after an application with that object had been rejected: *Davies v. Brecknell*, Probate and Divorce, vol. iii, 88.

#### THEATRICAL ENGAGEMENT.

Any actor who enters into a contract to perform for a certain period at a particular theatre may be restrained by injunction from performing at any other theatre during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere.

Observations on *Lumley v. Wagner*, (1 D. M. & G., 604); *Montague v. Flockton*, V.-C. M., vol. xvi, 189, (Eq. cases.)

#### WILL.

1. *Capacity—Delusions in Reference to the Conduct of Children—Will pronounced against—Executor's Costs—Practice.* A man, moved by capricious, frivolous, mean, or even bad motives, may disinherit wholly or partially his children, and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children, but there is a limit beyond which it will cease to be a question of harsh unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect. If such repulsion, amounting to a delusion as to character, is shown to have existed previous to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made, and the jury, in determining whether or not the delusion was operative, will have regard to the contents of the will and the circumstances surrounding the execution of it. *Prima facie*, an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to show eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of the will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the will be pronounced against: *Boughton v. Knight*, Probate and Divorce, vol. iii, 64.

2. *Execution—Attestation and Subscription.* The deceased executed his will in the presence of two witnesses, one of whom also made a mark in attestation of the signature of the deceased. The second witness then wrote the names of the deceased and the witness opposite their respective marks and also the word witness, but he did not subscribe his own name:

*Held*, that he did not by any word he wrote attest the signature of the deceased, and that the execution was invalid: *In the Goods of Eynon*, Probate and Divorce, vol. iii, 92.

3. *Revocation.* The testator, having executed a will and codicil, signed a second codicil, in which he expressed a desire to cancel his will, and that a document which he described as a will of earlier date, and the first and second codicils, should together stand as his last will and testament. The only document executed at the earlier date was a settlement on his marriage, which was not of a testamentary character:

*Held*, that the revocation of the will was absolute, and not dependent on the incorporation of the settlement in the papers admitted to probate: *In the Goods of Gentry*, Probate and Divorce, vol. iii, 80.

4. *Revocation, total, partial, or contingent—Dependent relative Revocation.* The testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. Testatrix, feeling unwell, desired her friend to stop there, and then tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by the testatrix and locked up, and she believed when she did so that these papers constituted a new will, and were not merely instructions for such a will:

*Held*, that it was a case of dependent relative revocation, a revocation dependent on the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained and the draft of the part which was destroyed: *Dancer v. Crabb*, Probate and Divorce, vol. iii, 98.

5. *Revocation on Erasure—Words erased not apparent—Dependent relative Revocation—Parol Evidence.* The principle of dependent relative revocation applies to the case where a testator has so entirely erased the name of a legatee that it is no longer apparent, and has substituted another name for it. The court will receive evidence to show what the original name was, and restore it to the probate if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee: *In the Goods of McCabe*, Probate and Divorce, vol. iii, 94.

## SELECTED DIGEST OF STATE REPORTS.

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[For this number of the REVIEW, selections have been made from the following State Reports: 46 Georgia; 4 Heiskell (Tennessee); 38 Indiana; 9 Kansas; 60 Maine; 51 Missouri; 49 New York (Court of Appeals); 51 New York (Commission of Appeals); 9 Rhode Island; 5 West Virginia; 31 Wisconsin.]

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### ACCEPTANCE.

When a disaster happens to a cargo in consequence of a peril or accident not within the exceptions in the bill of lading, a mere acceptance of the goods by the owner at the place of the disaster, or an intermediate port, will not preclude him from his remedy. It must appear that the acceptance was intended as a discharge of the vessel and her owner from any further responsibility: *Home Ins. Co. v. W. T. Co.*, 51 New York, 93.

### ACCORD AND SATISFACTION.

1. In a suit upon an instrument, by which the defendant promised to pay a certain sum to A., B., and C., in trust, to be expended within a county named, in constructing a railroad within certain limits, the persons named to select the corporation which should have the benefit of the subscription, an answer that when the instrument was executed by the defendant, it was agreed that if the railroad was located through the farm of the defendant, he should have the choice of paying the five hundred dollars or giving the right of way to the corporation, and that he had given such right of way, which had been accepted by the company, was held a sufficient defense, as an accord and satisfaction. It was also held good on the ground that A., B., and C., held a power not coupled with an interest, and the power could be revoked before execution and the acceptance thereof by the corporation: *The E. T. H. & C. R. R. Co. v. Wright*, 38 Indiana, 64.

2. A note received in full satisfaction and absolute payment of a debt has the same effect in extinguishing the interest as if payment had been made in cash: *Black v. Dorman*, 51 Mo., 31.

3. Plaintiff made a stipulation stating that he consented to, and the suit was thereby discontinued, and the cause of action released in consideration of the payment of the costs, and seventy dollars to plaintiff's attorney. Defendant paid the seventy dollars, and tendered the costs and set up an accord and satisfaction:

*Held*, that this was, at most, a simple unexecuted accord, and not a satisfaction: *Noe v. Christie*, 51 New York, 270.

### ACCOUNT STATED.

1. As a general rule, in an action upon an *account stated*, the defendant's promise to pay, or acknowledgment of indebtedness, must be shown to have had reference to a legal liability then existing, or to a moral obligation founded on an extinguished legal liability: *Frey v. Fond du Lac*, 24 Wis., 204; *Melchoir v. McCarty*, 31 Wis., 252.

2. This rule applies to an account stated for intoxicating liquors sold *without license*, in violation of law; and no recovery can be had in such a case: *Ib.*

3. But the rule is not applied to an account stated, or subsequent promise to pay,

for goods sold and delivered on Sunday; and a recovery may be had on a promise to pay for liquors sold on that day—such promise being made on a day other than Sunday, and the sale not being unlawful for any other reason: *Ib.*

#### ACTION.

1. An action to foreclose a mortgage, given to secure a bond, wherein judgment is asked against the obligor for any deficiency, is as to the latter an action arising on contract, and one wherein a several judgment may be had, and hence is subject to a counter claim of any other cause of action on contract which such obligor had against plaintiff at the time of the commencement of the action: *Hunt v. Chapman*, 51 New York, 555.

2. Where it is a custom among commission flour merchants that a vendee may rescind the sale and return the flour within ten days, if it proves unsound or damaged, the commission merchant to whom the flour is returned in accordance with the custom, and who afterwards sells it as unsound at its full real value, without laches on his part, may recover from his consignor the amount of the actual loss by such sale: *Randall v. Keelor*, 60 Maine, 37.

3. On November 27, 1860, the plaintiff conveyed with covenants of warrants, certain real estate to one J., but some doubt having been thrown upon the title by a levy of a creditor of the plaintiff's husband, the plaintiff in accordance with a written agreement with her grantee, deposited with the defendant the consideration money, to remain with him as collateral to said warranty for a reasonable and satisfactory time. On June 27, 1870, the grantee having deceased and the premises passed to his devisee, the plaintiff demanded the money of the defendant, and upon refusal to deliver it up, sued him in an action for money had and received:

*Held*, the action was not maintainable; but that a suit in equity was the proper remedy: *Randall v. Butler*, *Ib.*, 216.

4. The abandonment of an attachment of property in a suit against one surety on a note, constitutes no bar to the maintenance of a subsequent suit against the co-surety: *Chipman v. Todd*, *Ib.*, 282.

5. The city of Providence has an implied power, arising from and incident to its duties in relation to the streets and highways within its limits, not only to construct drains upon the surface of the streets, to carry off the water coming upon them in any way, but also to construct drains or sewers beneath the surface when necessary for a similar purpose. But the city is liable for injuries resulting from the making of such drains or sewers, if, by making them to prevent a nuisance, it creates a nuisance in another place, and merely transfers it from one locality to another: *Clark v. Peckham, City Treasurer*, 9 Rhode Island, 455.

6. No action for such nuisance can be maintained in favor of an individual simply because the city might be indicted. An individual is only entitled to sue when he has suffered some special damage above that arising to the public generally. Only the owner of land can sue for an injury caused by building a drain upon it: *Ib.*

7. A corporation is liable for an act which would give a right of action against an individual, if done by authority of the corporation, or of a branch of the government authorized to act for it, or if the act be ratified by the corporation or by its officers: *Ib.*

8. In an action of debt on a judgment obtained in the State of New York against two joint debtors, in which the only evidence of service of the process is the written acknowledgment of legal service thereof signed by one of them, the plaintiff can not maintain his action in the State of Rhode Island upon such a judgment, against

the debtor not served with process in the first suit, and a plea of *nul tiel record*, interposed by the defendant, is a good plea in bar of the action: *Frothingham v. Barnes, Ib., 474.*

9. Whether such a judgment, as against the debtor not served with process, can be sued in the State where it has been recovered, *quære*. It is certainly not a judgment in the sense of the constitution and laws of the United States, and can not be enforced as a judgment by virtue thereof, outside of the State where it was recovered: *Ib.*

10. An incorporated city is responsible for all damages that accrue in consequence of the action of mobs within its corporate limits, whether such damages are loss of property or injury to life and limb, and it makes no difference whether the loss of property, or the injury to life and limb, by such action of mob, might have been prevented or not; and it makes no difference whether any of the participants in such mob reside in the city or not: *City of Atchison v. Tirine, 9 Kan., 350.*

11. An action for the conversion of property does not lie against the administrator or executor of the wrong-doer: *Cherry v. Hardin, 4 Heiskell, 199.*

12. A suit brought in the name of the payee of a note which ought to have been executed to another, may, by proper replication and proof, be shown to be prosecuted for the benefit of the person interested in the note: *Barbee v. Williams, Ib., 522.*

#### ADMINISTRATION.

1. An administrator selling property in January, 1863, on a credit of twelve months, taking notes payable in Tennessee Bank notes; that course being advised by one of the distributees, and that currency being regarded by prudent men as the safest attainable:

*Held*, not guilty of a devastavit: *Bradshaw v. Cruise, 4 Heiskell, 260.*

2. Where a note was made to an executrix in her representative capacity, her administrator, in the event of her death, may sue on the note in his own name: *Black v. Dorman, 51 Mo., 31.*

3. In proceedings in equity to set aside an allowance by the County Court of sundry demands against the estate of a deceased person on the ground that the same were obtained by collusion between the claimants and the administrator: 1. It is not necessary that the latter should be joined: 2. The bill would not be multifarious where the matters charged were part of the same general transaction in which all participated, and in the results of which all were interested: *Mayberry v. McClurg, Ib., 256.*

4. An administrator is not an insurer of the property of the decedent. He is liable for loss thereof, only where he fails to exercise that care and diligence which a prudent man would exercise in the management of his own property: *Fudge v. Durn, Ib., 264.*

5. In suit brought by a public administrator, the body of the petition should show his authority to bring the action. Matters set forth in the caption will not obviate defects in that regard. The caption is simply a *descriptio personæ*, and forms no part of the statement, required in the petition: *Headle v. Cloud, Ib., 301.*

#### ADMINISTRATORS AND EXECUTORS.

1. An executor, who, by the will of his testator (probated in 1853, and by which a solvent estate of more than \$200,000 is committed to his hands), is directed to move a slave to a free State, to be there manumitted, and to invest for such manumitted slave, on his arrival at age, which occurs in 1862, \$3,000, can not, after refusing to execute the bequest of his testator until the close of the war, free himself

from liability by showing that the estate has perished on his hands from the results of the war and other causes: *Anderson v. Green, Executor*, 45 Ga., 361.

2. Where land is "regularly advertised and sold at administrator's sale" (the record states no more), and is afterwards levied on under a judgment obtained against the intestate in his life-time, and the Court decides that the administrator's sale divests the judgment lien—to which judgment, exception is taken—the plaintiff in error, must show affirmatively, that the estate was solvent, and the order of sale was not granted for the payment of debts, but for distribution only, in order to entitle him to a reversal of the judgment, even if this would do so, and as to this, we reserve our opinion: *Carhart et als. v. Vann, Ib.*, 389.

#### ADVANCEMENTS.

In a transaction between father and child, a sale from the father will not be treated as an advancement merely because the price paid was inadequate: *Merri-man v. Lacefield*, 4 Heiskell, 209.

#### AGENCY.

1. Where a married man owning property covered by a fire insurance policy, was absent from home for fourteen months before a loss occurred, and continued to be absent at the time of the trial of an action upon the policy (nearly three years after his departure), and was totally ignorant of the loss and the circumstances attending it:

*Held*, that there arose *ex necessitate* an authority in the wife, as his agent, to make the proofs and do other acts required by the assured: *O'Conner v. Hartford Fire Ins. Co.*, 31 Wis., 160.

2. Testimony of the wife that the husband had told her "to care for the place and property," "to take care of it the same as himself," until he returned, would also tend to show an *express* delegation of power to her to act as his agent in the matter of such loss: *Ib.*

3. An objection that the policy required "the assured" to give the notice, and verify the proofs by his oath, can not avail, where, in the permanent absence of the assured, the notice has been given and the proofs verified by his agent left in charge of the property: *Ib.*

4. The wife, who has acted as her husband's duly authorized agent in such a case, is a competent witness as to facts within her knowledge, connected with such loss: *Ib.*

5. But the defendant company was not entitled to show by the testimony of the wife, that plaintiff did not hold the legal title to the land, but only an executory contract therefor; such fact not being one which had occurred within the scope of her agency, or with which she was connected as such agent: *Ib.*

6. In an action by a clerk against his employer on an agreement whereby the former was to receive as compensation a certain portion of the net profits of the business, where it appeared that plaintiff kept the books and managed the business, the books would be proper but not conclusive evidence on either side. Defendant might show that plaintiff had introduced false or fraudulent entries into the books of the concern. The rule of ascertaining damages in such cases is precisely the same as that which applies to partnership accounts: *Wiggins v. Graham*, 51 Mo., 17.

7. The officers of a corporation, unless prohibited by the charter, may confer authority upon its agent to draw and execute bills of exchange on behalf of the company. No action in writing on the part of the board of directors is necessary in

order to vest such authority in the agent: *Preston v. Missouri and Pennsylvania Lead Co., Ib., 43.*

8. Where an agent of a bank, by means of false representations as to his authority to employ attorneys for his principal, secured professional services for the bank in sundry attachment proceedings, and on suit brought against the bank by the attorney for the value of his services, it turned out that the agent had no such authority as represented, and so the bank could not be made responsible:

*Held*, that the attorney had his action against the agent personally for the value of his services. And that his petition would not be held bad on demurrer, for misjoinder, because it included counts for services in the different attachment suits; said suits appearing to have been brought under the same employment. And the measure of his damages would be the reasonable value of his services as attorney, together with the actual amount of his costs incurred in the suit against the bank: *Wright v. Baldwin, Ib., 269.*

9. A draft drawn by A. upon B., by inadvertance of the collector was presented to C., and paid by him, under a mistaken impression as to his liability, and remitted to A. by the collector before the mistake was discovered:

*Held*, that as the money was paid by C., and received by the collector under a mutual mistake as to the facts, the latter would be liable to the former in an action for money paid. In such a case it makes no difference that the plaintiff had the means of knowing of the error, and might, by diligence and care have avoided the payment: *Koontz v. Central Bank, Ib., 275.*

#### AGENT.

1. Where by contract a citizen of this State became the agent of a citizen and resident of the State of Virginia, in 1857, and the agency continued:

*Held*, that the fact that the principal was a rebel, and within the Confederate lines in 1863, did not of itself put an end to the agency: *Fisher v. Krutz, 9 Kan., 501.*

2. An agent with whom notes are left for collection, without special authority, could not receive payment in Confederate Treasury notes: *Clark v. Thomas, 4 Heiskell, 419.*

#### ALIEN.

1. G. H., a citizen, agreed to buy, and bought, a lot of land for J. W. H., an alien, furnished the money, entered into possession, and died, leaving a widow, and infant son. He remained an alien up to the time of his death. Upon the filing of a bill in equity to compel a conveyance of said estate by G. H. to the infant son of J. W. H., as his heir at law:

*Held*, that the infant son of J. W. H. had no claim to a decree of the Court to direct a conveyance to him; neither could G. H. be compelled to convey it for the benefit of the administrator, to enable him to pay out of his estate the debts of the deceased: *Haigh v. Haigh, 9 R. I., 26.*

2. The statute of 11th and 12th Wm. III., chapter 6, *held* inapplicable to the present case. Upon the death of an alien, his estate *ipso facto* escheat, he having no inheritable blood by which it can be transmitted: *Ib.*

3. It is a rule of construction, that a statute, unless it appears distinctly that it is intended to operate on a case already pending, does not operate upon any such case. Therefore, chapter 709 of the statute, which provides that if an alien die thereafter, his estate shall be transmitted to his heirs:

*Held*, not to effect the case at bar, the bill having been filed before the passage of the act: *Ib.*

## ALTERATION.

1. A material alteration of a promissory note, such as for instance, changing it to a negotiable note without the knowledge or consent, either express or implied, of the promissor, vitiates it, although it may be in the hands of an innocent holder: *Morehead v. Parkersburg Nat. Bank*, 5 W. Va., 74.

2. It lies upon the party seeking to enforce a bill or note, to account for any alteration that appears on the face of the instrument: *Piercy's heirs v. Piercy, Executor*, *Ib.*, 199.

## AMENDMENT.

1. Neither the common law, nor the statutes of this State, allows the plaintiff, in an action of trover, to amend his writ by inserting the names of other plaintiffs: *Ayer v. Gleason*, 60 Maine, 207.

2. Thus, where the defendant was summoned in action of trover to answer to James C. Ayer, and ———, of, etc., co-partners, under the style and firm name of James C. Ayer & Co., an amendment by inserting the names of the other members of the firm, is not allowable: *Ib.*

## ANCIENT LIGHTS.

An implied grant of an easement of light will be sustained only in cases of real necessity; and will be denied or regretted in cases where it appears that the owner claiming the easement can, at a reasonable cost, have, or substitute, other lights to his building: *Powell v. Sims*, 5 West Virginia, 1.

## APPEAL.

1. *From Justice's Court.* On appeal from justice's court, where the cause is triable *de novo* at the Circuit, either party may be allowed to enlarge his demand of damages beyond the amount of which a justice has jurisdiction: *Heath v. Heath*, 31 Wisconsin, 223.

2. *To Supreme Court.* The objection that the complaint does not state a cause of action is not waived by failing to demur on that ground, or to appeal from an order overruling such a demurrer, but may still be urged against a judgment in plaintiff's favor: *Armstrong v. Gibson*, *Ib.*, 61.

3. If there is any evidence to sustain the facts found by a referee, his conclusion, if the facts are capable of the interpretation given to them by him, is final so far as this Court is concerned; but where his conclusion is predicated in part upon facts not proven, which may have had some influence, the judgment will be reversed; as it can not be determined whether those assumed facts might not have had a controlling influence. Thus, where a referee finds various facts, from which he finds an intent to evade the usury laws, and some of the material facts are unsupported by evidence, or are against evidence, it is an error of law, which is fatal to the judgment, although usury may have been predicated upon facts proven: *Matthews v. Coe*, 49 New York, 57.

4. Where a witness, in answer to a proper question which is objected to, gives testimony not called for by it, which is incompetent, but no objection is made to the answer or motion to strike it out, it can not be objected to upon review: *Crippen v. Morss*, *Ib.*, 63.

5. This Court is not authorized to review a judgment and reverse it for an alleged error which does not appear upon the record, and is only shown by expressions in the opinion of the Court below: *Laning v. N. Y. C. R. R.*, *Ib.*, 521.

6. An appellant will not be heard to allege as error that which was inserted in a judgment at his own instance: *Proestler v. Kuhn*, *Ib.*, 654.

#### ARBITRAMENT AND AWARD.

1. An award having been made the judgment of the Court, without objection, equity will not interfere to set it aside on account of fraud in the original cause of action, or of fraud in obtaining the complainant's consent to the arbitration, where all the facts were known at the time of the motion to make the award the judgment of the Court: *Clark et al. v. Thurmond*, 46 Georgia, 97.

2. If a submission contain no provision in relation to the rules of evidence that shall govern the referees, they are not restricted to the rules of the common law, but may receive the statements of parties without requiring them to be first sworn: *Sadborn v. Paul*, 60 Maine, 325.

3. To an action on a common law award based upon the breach of a written contract, it is no defense that the contract before the referees was not identified so long as they had the right one: *Ib.*

#### ASSAULT AND BATTERY.

1. In an action for assault and battery, *compensatory* (as distinguished from *punitive*) damages are of two kinds: (1). Those which may be recovered for the actual personal or pecuniary injury and loss; the elements of which are, loss of time, bodily suffering, impaired physical or mental powers, mutilation and disfigurement, expenses of surgical and other attendance, and the like. (2). Those which may be recovered for injuries to the feelings, arising from the insult or dignity, the public exposure and contumely, and the like: *Wilson v. Young*, 31 Wisconsin, 574.

2. Compensatory damages of the *first* kind are to be determined without reference to the question whether defendant was influenced by malicious motives in the act complained of; and, on the other hand, evidence of threatening or aggravating language, or malicious conduct on *plaintiff's* part (not constituting a legal *justification* of defendant's act), can not be considered in *mitigation* of such damages: *Ib.*

3. Compensatory damages of the *second* kind depend entirely upon the *malice* of defendant; and as evidence of such may be given to increase that kind of damages, so evidence of threatening or malicious words or acts on plaintiff's part, just previous to the assault, though not constituting a legal justification, should be admitted to mitigate or even defeat such damages: *Ib.*

4. Dixon, C. J., is of opinion that proof of words and acts of provocation on plaintiff's part, immediately previous to the assault and constituting a part of the *res gestæ*, should be considered in mitigation of *compensatory damages in general*, adhering to the view expressed in *Morley v. Dunbar*, 24 Wis., 183: *Ib.*

#### ASSESSMENT AND TAXATION.

1. Assessors are not personally liable for errors or mistakes in the assessment where they have jurisdiction and act within the scope of their authority, but if they exceed their powers and act without authority, and in contravention of the statute prescribing and regulating their duties, they are civilly liable to any person injured by their action: *Clark v. Norton*, 49 New York, 243.

2. Assessments must be made by the 1st of July, and of property and persons in respect to the liability as it exists upon that day. An individual, not liable upon that day, can not be placed upon the assessment roll thereafter, nor can a person, whose name is properly upon the roll, be assessed for property subsequently acquired. After the deposit of the roll for examination, the assessors can not add names thereto, or add to the assessment of individuals other property, or change the character of the property assessed. Where the roll is completed, the duty of the assessor is fully performed, except in the matter of a review of the assessment as made and as permitted by statute.

3. Although one purchasing property after the completion of the roll agrees to pay the tax thereon, this confers no jurisdiction upon the assessors to change the assessment, nor does it operate as a waiver of the legal rights of the purchaser. It is a matter resting in contract between the parties, and is to be enforced in the usual way: *Ib.*

4. A substantial compliance with the statute in the measures preliminary to the taxations of persons and property, in all matters which are of the substance of the procedure, and designed for the protection of the tax-payers, is a condition precedent to the legality and validity of the tax: *Westfall v. Preston, Ib., 349.*

5. It is only for an improvement lawfully made, and for work done and expenses incurred, as authorized by law, that an assessment can lawfully be levied, and the property of the citizen taxed: *People ex rel. v. Haines, Ib., 587.*

6. A departure by assessors from the standard fixed by statute for estimating the value of property placed upon the assessment roll, can not be corrected upon *certiorari*, nor can their failure to assess the property of a corporation, as required, be so corrected. The Court may reverse the assessment as made, and direct a re-assessment; but after the roll has been delivered to the Board of Supervisors and the power of the assessors over it has ceased, a *certiorari* should not be allowed, and, if allowed, should be quashed even after return made: *People ex rel. v. Delany, Ib., 655.*

#### ASSIGNEE.

An assignee of a bond taken in payment of purchase money of land, although he may have notice of fraud in the sale of the land, can not be placed in a worse condition than his assignor, the vendor, with reference to the payment of such purchase money: *Highland et al. v. Highland et al., 5 West Virginia, 63.*

#### ASSIGNMENTS.

A merchant being indebted to certain judgment creditors, and being in failing circumstances, turned over his merchandise to an agent to be sold, and the proceeds to be distributed pro rata among his creditors:

*Held*, that if the proceedings were in good faith, the goods would not be subject to execution on behalf of one creditor to satisfy his own individual claim: *Wettmore v. Hastings, 51 Mo., 171.*

#### ASSUMPSIT.

1. A mechanic can not maintain assumpsit against the guardian of a minor for labor performed upon a ward's building: *Robnson v. Hersey, 60 Maine, 225.*

2. When the fraudulent representations of the seller of property, whereby the purchaser was induced to buy, were such as give the latter the right to rescind, and he does rescind the sale and surrender profession to the vendor, the law implies a promise, on the part of the seller, to pay the purchaser for labor and materials in making reasonable repairs upon the property: *Farris v. Ware, Ib., 482.*

3. Thus the defendant fraudulently represented the water power connected with his tannery, to be sufficient to work it continuously throughout the year, and the plaintiff, having no knowledge of the premises, and relying upon the representations, was thereby induced to purchase the tannery, and thereupon, after taking a bond thereof and giving his notes for the price, the plaintiff entered into possession and under the advice of the defendant, expended large sums in repairs; but the water failing, the plaintiff abandoned the property and notified the defendant that he considered the contract of purchase rescinded, whereupon the defendant took

possession of the premises and had the benefit of the repairs. In assumpsit to recover for the labor and materials in making the repairs:

*Held*, that the action was maintainable: *Ib*

ATTACHMENT.

1. An attachment bill alleging that complainant is surety for defendant; that since he became so, defendant has become dissipated, careless, almost a sot; is greatly in debt, and daily becoming more so, and is utterly insolvent; that complainant has reason to believe and does believe, that defendant will convey and dispose of his groceries and articles in his grocery in order to defraud his creditors; shows no sufficient ground for an attachment: *Jackson v. Burke*, 4 Heiskell, 610.

2. An allegation is an attachment bill "that defendants, in conveying their property, will endeavor to defeat the collection of complainant's debts; that they have avoided, and, as he believes, they intend, by future and fraudulent conveyances and transfers, to evade, and avoid payment of the debt," is not ground for issuing the writ: *McHaney v. Cawthorn*, *Ib.*, 608.

3. An ancillary attachment issued without affidavit will be quashed on motion of the defendant, after judgment on the merits: *Watt v. Carnes*, *Ib.*, 532.

4. An affidavit neither signed nor certified is no affidavit: *Ib*.

5. The affidavit is part of the record not subject to be aided or attacked by parol: *Ib*.

6. A judgment rendered upon answer of a garnishee not in writing, or not signed by the garnishee, is erroneous, and will be reversed: *Pickler v. Rainey*, *Ib.*, 335.

7. Where one creditor by bill in equity seeks to set aside a sale of his debtor's property as fraudulent, and attaches the property, and another creditor proceeds by subsequent bill for the same purpose, but in addition attaches the purchase money due on the sale, and prays relief against the purchaser of the sale is found to be fair; on holding the sale fair, the latter creditor will have a prior right to the fund to the first, who only attached the property: *Sloane v. Williamson*; *Hansboro v. Williamson*, *Ib.*, 506.

8. The plaintiff as an officer, having on July 13th, attached a debtor's personal property, took from the present defendant an alternative receipt to pay a certain sum or re-deliver the goods attached on demand, whereupon the goods went back into the debtor's possession.

On September 2d, the debtor filed his petition in bankruptcy, and on the succeeding 27th was adjudged a bankrupt, in an action on the receipt in the name of the officer for the benefit of the assignee of the debtor:

*Held*, that the attachment was dissolved by the taking of the receipt: *Mitchell v. Gooch*, 60 Maine, 110.

9. The fraudulent assignment of a bond and mortgage by a debtor does not prevent his creditor from acquiring a lien thereon by attachment; and where such lien has been acquired by the service of the attachment, with the proper notice upon the obligor and mortgagor, the attachment creditor, after perfecting judgment and issuing execution, may maintain an equitable action in his own name to enforce the lien, by setting the fraudulent transfer aside: *M. and T. Bank v. Dakin*, 51 New York, 519.

10. There is an original jurisdiction in a court of equity, independent of the statute in relation to attachments, to take cognizance of actions of this character: *Ib*.

AWARD.

1. A charge in a bill that one of the arbitrators acted as the "adviser and partisan"

of the party appointing or selecting him, is a sufficient charge of partiality and misconduct, to give a court of equity jurisdiction of a case asking to set aside an award: *Wheeling Gas Company v. The City of Wheeling*, 5 West Virginia, 448.

2. It is not alone the fact, but the aspect of perfect fairness, which must be preserved, and an arbitrator can not be too careful as to his conduct, holding this end in view. It is not a conscientious intent to be honest, on the part of the arbitrator, nor his conviction that he is so, that can suffice. It is his external actions that will be subjected to scrutiny, and if these do not satisfactorily bear the test the award will fall: *Ib.*

3. An award should be in its terms reasonably certain, and not leave its own meaning open to further controversy. Hence, an award that the defendants "have the right to keep up and maintain the caplog or permanent rolling way of their said dam to the top of the great rock in their pond above said dam and no higher, and to keep on said caplog flash boards twelve inches wide, at all times except in times of freshet," must be set aside for uncertainty—the word "*freshet*" so varying in its meaning as to necessitate constant litigation; as, in case of a suit, a jury could only determine whether the state of the water in the particular case before them did or did not constitute a freshet: *Harris v. Social Manufacturing Company*, 9 Rhode Island, 99.

#### BAILMENT.

1. Where the bailor instructs the bailee not to deliver his property to any person except upon his written order, a delivery to the wife of the bailor without such order is not equivalent to a delivery to the husband, and does not discharge the bailee from his liability: *Kowing v. Manly*, 49 New York, 193.

2. Although, where a wife has obtained possession of the husband's property from his bailee by a fraud, the bailee could maintain an action against both husband and wife for the wrong, that is not a defense to and will not bar a recovery by him against the bailee: *Ib.*

#### BANK DIRECTORS.

1. Where no qualification is required and there is no usage to control, a person who is elected a bank director is presumed to accept the office unless he declines it. This presumption may be rebutted. Whether simple non-action as a director, for five months, would be ordinarily sufficient to rebut it—query. But where the stockholders of a bank in an instrument authorizing its conversion from a State to a National Bank, named all the directors who had been elected at the last annual election as those "who are now the directors of said bank, the court can not hold that two of those so named were not directors at the time of such conversion, because they had never acted in that capacity since their election five months previously: *Lockwood et al., Trustees, v. Mechanics' National Bank et al.*, 9 Rhode Island, 308.

2. By the provisions of section 44 of the National Currency Act of 1864 (chapter 106, 1st session 38th Congress), upon the conversion of a State to a National Bank, all the directors of the former become those of the latter, until an election or appointment by the National Bank. *Semble*, that no oath is required from these *ad interim* directors, the oath prescribed by section 9 of the aforesaid act being designated for those regularly elected by the National Bank, but, assuming its necessity, a majority of those who were the directors of the State Bank before its conversion is necessary to make a quorum of the board of the National Bank: *Ib.*

#### BANKRUPT ACT.

A judgment in an action of trespass for assault and battery is a debt discharga-

ble under the National Bankrupt Act of 1867: *Manning and Wife v. Keyes*, 9 Rhode Island, 224.

#### BANKRUPTCY.

1. The Supreme Court will not take cognizance of a plea of discharge in bankruptcy since the appeal from the judgment below: *Riggs v. White*, 4 Heiskell, 503.

2. A discharge in bankruptcy does not release a mortgage or other lien on property created prior to the commencement of the proceeding, nor prevent the enforcement of the lien: *Truitt et al. v. Truitt*, 38 Indiana, 16.

#### BANKS.

1. When a note, payable at bank, is placed in a bank for collection, it is the duty of the bank to see to it that it is properly presented for payment, and on its dishonor, to have it duly protested, and notice given to its indorsers: *Georgia National Bank v. Henderson*, 46 Georgia, 487.

2. When a bill of exchange payable at ————, was sent to a bank for collection, and the bank treating it as a bank check, and not entitled to days of grace, presented it for payment, and had it protested, etc., on the day of its maturity—without days of grace—by means of which the indorser was discharged, and it was in evidence that the bank was notified by the indorser at the time, that he claimed the paper to have days of grace:

*Held*, that the bank was liable to the person who deposited the paper for collection for damages, for its negligence in not presenting the check, as required by law, and causing notice of its non-payment to be given to the indorser: *Ib.*

3. A State Bank, not specially authorized by its charter to do so, could not, in 1862, issue any of its bills, intended to be used as money, redeemable otherwise than with gold or silver coin. Where it did issue bills at that date, in the usual form, it is inadmissible in a suit on them by a *bona fide* holder, who did not receive them from the bank, but purchased them from others, to prove that they were intended by the bank to be payable in Confederate currency, and were so understood by the community in which the bank was located: *Manufacturers' Bank of Macon v. Lamar, Ib.*, 563.

#### BILLS AND NOTES.

1. Where it was agreed at the time of the execution of a note, that either it or its proceeds should go to a third party, in such case the latter would be the substantial creditor, and if the payee gave no consideration for it, he would be a mere naked trustee, and neither he nor his assigns could set up an interest against the real beneficiary: *Callaway v. Johnson*, 51 Mo., 33.

2. The signature on the back of a note of one who is neither payee nor indorser, is *prima facie* that of maker. But this presumption may be repelled by parol evidence. It may be thus shown that in fact he signed only as guarantor: *Seymour v. Farrel, Ib.*, 95.

3. A note made to C. H. Morris, agent, is payable to him personally. The word agent after his name is merely *describo personæ*: *Toledo Agricultural Works v. Hewing's Adm., Ib.*, 128.

4. The maker of a promissory note whose signature is obtained without his consent, will not be held on the note, even in the hands of an innocent holder for value before maturity: *Briggs v. Exart, Ib.*, 245.

5. A forged insertion of rate of interest in a negotiable promissory note by the payee, will not impair the liability of a subsequent indorser to an innocent holder for value, before maturity, but will discharge the maker: *Washington Savings Bank v. Eckey, Ib., 272.*

6. When a surety on a promissory note has been compelled under a judgment rendered against him to pay the note, his right of action against the maker of the note is on contract as on an implied promise to re-pay the money and not on the note itself; that is merged in the judgment. And where the note was for an amount within a justice's jurisdiction, but the judgment was for an amount exceeding his jurisdiction in actions founded on contract, the surety's action was without the jurisdiction of the justice: *Blake v. Downey, Ib., 437.*

7. Where A. sells and transfers to B., the note of C., and guarantees its payment, the transfer is valid, and B. may enforce the note against C., even though the guaranty is void for usury: *Armstrong v. Gilson, 31 Wisconsin, 61.*

8. The presumption that a note is unpaid, arising from the payee's possession thereof, uncanceled, and unextinguished by indorsed payments, is not sufficiently met by showing payments of money by the maker to the payee, without further showing that there were *no other dealings* between the parties, upon which such payments might have been made: *Somervail v. Gilies, Ib., 152.*

9. Where such absence of other dealings is shown, proof of moneys paid by the maker to the payee would create a strong and almost conclusive presumption that they were paid upon the note: *Ib.*

10. The rule of law requiring protest of a foreign bill of exchange is wholly founded upon the custom of merchants; and in an action against a notary for neglect to make presentment and demand, evidence that it is the common and universal usage at the place where the bill was payable for notary's clerks to make such presentment and demand, and that the bill in question was presented and demanded of payment made by the clerk of the defendant, is proper and admissible. A knowledge, on the part of plaintiff, of this usage, is not necessary to its validity: *Com. Bank of Ky. v. Varnum, 49 New York, 269.*

11. A notary is not presumed to be a lawyer who is to revise or reverse the decision of his employer as to the character of a bill, and as to whether it is entitled to days of grace or not. If, therefore, a bill is delivered to him with directions to make demand and protest upon the wrong day, a right of action does not arise against him on account of the error: *Ib.*

12. A memorandum upon a note made contemporaneously with and delivered with it, and intended as a part of the contract, is a substantial part of the note, and qualifies it the same as if inserted in the body of the instrument, and with it constitutes a single contract: *Benedict v. Cowden, Ib., 396.*

13. Where such memorandum is an essential part of the note, modifying the obligation, the severance of it from the note without the consent of the maker is a material alteration, and destroys the note even in the hands of an innocent indorser for value: *Ib.*

14. Where one sells promissory notes less than their face, representing them to be business papers, when in fact they are accommodation notes, and thus usurious and void in the hands of the vendee, the latter may rescind the contract and recover back the purchase-money, although there be no fraud or warranty. It is no answer that the parties to the paper might waive defense and pay them: *Webb v. Odell, Ib., 583.*

15. The next day after presentment and demand of payment of a note payable at a place in the city of New York, the clerk of the Notary examined the city direc-

try to find the address of an indorser, whose address was not upon the note. Not finding it, he inquired of the maker, who gave him a wrong address, to which he mailed notice :

*Held*, that this was due diligence and sufficient to charge the indorser: *Gantrey v. Duane*, 51 New York, 84.

16. One B. through fraud procured of defendants goods upon credit, for which he gave his notes, and as collateral security gave a mortgage upon lands which he did not own, and transferred a fictitious note and a policy of life insurance. To settle defendants' claim, B. through fraud, of which defendants had no knowledge or notice, procured plaintiff's indorsement to two notes made by B., payable to defendants, which were to be and were used in taking up the old notes, and upon receipt defendants surrendered said notes and the collaterals. Upon discovery of the fraud plaintiff brought suit to have his indorsement cancelled :

*Held*, that although the presumption of law from the face of the note was that the plaintiff was only liable as subsequent indorser, yet appearing that he intended to become security for the debt to the payees, he was liable as such ; that the surrender of the original notes was a sufficient consideration to make defendants *bona fide* holders of the new notes, and that their position as such was not affected by the fact that they were the payees named therein and that plaintiff therefore had no cause of action : *Clothier v. Adriance*, *Ib.*, 322.

17. Where A. makes his note for the accommodation and general benefit of B. without restrictions, and B. transfers the same to C. in payment of, or as security for, an antecedent debt, the existence of the debt is a sufficient consideration for the transfer, and C. can maintain an action on the note against A. : *Schepp v. Carpenter*, *Ib.*, 602.

#### BOND.

1. A recital in a bond given by one co-partner to another, upon dissolution of the co-partnership, setting forth as the consideration therefor, the transfer and the delivery by the obligee to his former partner of the assets of the firm, is a substantive part of the agreement, and can not be varied or contradicted by parol evidence. Where a bond is delivered to the obligee or his agent, it can not be shown by parol that it was delivered as in escrow : *Cocks v. Barker*, 49 New York, 107.

#### BOND FOR TITLE.

1. A deed or bond for titles to a tract of land, by its number in the State survey, binds the obligor to make title to the land within the boundaries of such survey, and if a part be sold off before the date of the deed, this is a breach of the bond, nor is this breach excused by the fact that the quantity sold off is small, and the bond describes the number, containing two hundred and two and one-half acres, more or less : *Smith v. Eason*, 46 Georgia, 316.

2. Proof that the obligee in a bond for titles, knew that the obligor was not the owner of the whole of the land described in the bond, is no reply to a plea of a breach unless it appear that there was a mistake in the description : *Ib.*

#### BOUNDARIES.

Practical location and acquiescence for a less term than twenty years in an erroneous boundary line, can not be claimed to the exclusion of evidence of the true line, where the premises were wild and uncultivated, and practically unoccupied : *Townsend v. Hart*, 51 N. Y., 656.

## BROKER.

1. A party having employed a broker to sell real estate, may, notwithstanding, negotiate himself, and if he does so without any agency of the broker, he is not liable to the latter for a commission. To entitle the broker to his commission, he must be an efficient agent in or the procuring cause of the contract: *McClave v. Paine*, 49 N. Y., 651.

2. To entitle a real estate broker to compensation, it is sufficient that a sale is effected through his agency, as its procuring cause, and if his communications with the purchaser are the means of bringing him and the owner together, and a sale results in consequence, the compensation is earned, although the broker does not negotiate, and is not present at the sale: *Lloyd v. Mathews*, 51 N. Y., 124.

## CARRIER.

1. If a passenger on a railway train, before entering the car, properly applies at the ticket office of the agent of the company for a ticket, and, without fault on his part, but from either the willfulness or the mistake or inadvertence of the ticket agent, is unable to procure one, he, when, according to the rules of the company, fare in addition to the price required to purchase a ticket is demanded of him by the conductor on the cars, may pay, under protest, the excess demanded, and afterwards by suit recover it back; but he is not obliged to do so; on the contrary, he is entitled to be carried at the ticket rate without paying the excess demanded, and has the choice of paying the excess, or of insisting upon his right to be carried at the ticket rate, and holding the company responsible in damages for a refusal to carry him: *The Jeffersonville R. R. Co. v. Rogers*, 38 Indiana, 116.

2. If, when insisting upon his right, in such case, to be carried at the ticket rate, the passenger is, by the conductor of the train, expelled from the car in a spirit of oppressive malice or wantonness, he is entitled to recover exemplary damages against the company; a verdict for which damages an appellate court will rarely set aside for excess, merely: *Ib.*

3. In such case, the passenger wrongfully expelled from the cars, may be entitled to exemplary damages by reason of the time, place, circumstances, and manner of expulsion, though no harsh or unnecessary means were resorted to in order to effect his expulsion: *Ib.*

4. A person who undertakes, though it may be only *pro hac vice*, to carry by river, for hire without special contract, incurs the responsibility of a common carrier: *Moss v. Bettis*, 4 Heiskell, 661.

5. Where goods are shipped by railway, and arrive at their destination within the usual time required for transportation, and are there deposited by the company in a place of safety, and held by them ready to be delivered on demand, their liability as common carriers ceases, (unless the custom of trade is shown to be otherwise as to delivery,) and that of warehousemen commences: *Southern Railroad Company v. Felder*, 46 Georgia, 433.

6. No notice to the consignee, where the goods arrive on time, is necessary to reduce the liability of the company from that of common carriers to that of warehousemen: *Ib.*

7. If the goods arrive out of time, and after they have been demanded by the consignee, it might require notice of their arrival to the consignee, and a reasonable time after, to relieve the company from the extraordinary liability imposed by law upon a common carrier: *Ib.*

CAUSE OF ACTION.

1. He who, by his negligence or misconduct, creates or suffers a fire upon his own premises, which, burning his own property, spreads thence to the immediate adjacent premises, and destroys the property of another, is liable to the latter for the damages sustained by him: *Webb v. R. W. & O. R. R.*, 49 New York, 420.

2. The complaint set forth a lease of certain hotel property in Omaha, which lease contained in the following clause: "A lien to be given by the said lessees to said lessors, to secure the payment thereof (*i. e.*, rent) on all the furniture that shall be placed in said hotel by said lessees." It then alleged the taking possession by the lessees, and their placing in the hotel a large amount of furniture, and their subsequent abandonment of it, they being utterly insolvent. It is then alleged that defendant took possession of the furniture, sold the same, and converted the proceeds, leaving a large amount of rent unpaid, in fraud of the rights of plaintiff (who claimed as assignee of the lessor), and who was thus prevented from enforcing his lien thereon. The complaint further alleged that defendant had, in its possession, the avails of the sale of said furniture, which justly belonged to plaintiff by virtue of the alleged lien, and wrongfully withheld the same from the plaintiff, to his great damage, etc.; upon demurrer:

*Held* (Allen, J., Folger and Rapallo, JJ., concurring), that it was immaterial whether plaintiff's right was based upon a legal title to the property, or upon an equity entitling him, as against defendant, to pursue the avails thereof; that the clause in the lease did not create a lien, but was a covenant to do so, and one of which a court of equity would decree a specific performance; that if the property had remained unchanged in defendant's possession, plaintiff could have followed it in equity, and that, as these remedies are lost by the wrongful act of defendant, plaintiff could acquire, claim and have a lien upon the avails in place of the property itself; and that, therefore, the complaint contained a sufficient cause of action: *Hale v. O. National Bank, Ib.*, 626.

3. Plaintiffs transferred to defendants, by receipted bill of sale, certain railroad bonds. They also executed and delivered, with the bill of sale, a guaranty in substance, that the companies issuing the bonds should finish their roads, and be consolidated into one within one year, and in default thereof, they agreed to refund the sum received, with interest, upon return of the bonds purchased. The roads were not finished within the year, and the companies made default in the payment of the interest coupons maturing upon the bonds. Plaintiffs, at defendants' request, and to prevent the enforcement of the guaranty, paid the coupons which were transferred to them. Subsequently, the companies being still embarrassed, proposed to compromise the interest accrued upon their bonds. Plaintiffs agreed to the proposal; but defendants required, as a condition of their assent, and received from plaintiffs a written agreement that such assent should, in no wise, prejudice defendants' rights under the guaranty, but that it should remain in full force some three years after, defendants notified plaintiffs of their intention to enforce the guaranty, but that they would not commence proceeding if plaintiffs would pay the past due coupons. No attention was paid to the notice, and no proceedings were taken to enforce the guaranty. The lands having subsequently risen in the market, defendants tendered the purchase money, and claimed a return of the bonds, and upon defendants refusal, brought action to compel such return:

*Held*, that plaintiffs retained no option to require a return of the lands upon refunding the money, but that the option was with the defendants to determine whether the transaction should be an absolute sale or a loan; that this option was not deter-

mined by any of the subsequent transactions up to the time of the tender, and that, therefore, plaintiffs had no right of action: *Sechfield v. Irvin*, 51 New York, 51.

4. Defendant contracted to transport a lot of hogs for plaintiffs from Buffalo to Albany. By the contract, in consideration of a reduced rate of freight, plaintiffs assumed the risks of injuries from heat, etc. Forty-three of the hogs died from the effects of heat, the result of the negligence of the defendant's employees in not watering and cooling the hogs by wetting. In an action to recover damages:

*Held*, that as the common law liability of carriers did not apply to live stock, but in the transportation thereof, they were only liable for negligence. To give effect to the stipulation in the contract, it must be construed as exempting defendant from injuries by heat, the result of negligence, and that therefore defendant was not liable: *Crayon v. N. Y. C. R. R. Co.*, *Ib.*, 6.

5. Where tenants in common of a quantity of grain agree to a division thereof and settle the portion belonging to one, the apportionment operates as a severance of the tenancy in common, and the one whose portion is thus allotted, can, upon a demand and refusal to deliver up the same, maintain an action for the conversion thereof against his former co-tenant having the property in his possession, although such portion was never in fact separated from the residue. The possession of the latter, after such severance, is simply that of bailee: *Lobdell v. Stowell*, *Ib.*

6. Plaintiff, a widow whose minor daughter was out at service, sent for her to aid temporarily during sickness. She came home, remained a few days assisting in household duties and then returned to her own employment. While thus at home she became pregnant by defendant. In an action to recover damages for loss of services:

*Held*, that the daughter was in the actual service of the plaintiff at the time, in such sense that the action could be maintained: *Gray v. Durland*, 51 N. Y., 424.

7. Where one places a steam boiler upon his premises, and operates the same with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence upon his part, he is not liable for damages to his neighbor occasioned by the explosion of the boiler: *Lossee v. Buchanan*, *Ib.*

8. If the explosion was caused by defect in the manufacture of the boiler, he is not liable in the absence of proof that such defect was known to him, or was discoverable upon examination, or by the application of known tests: *Ib.*

9. The manufacturer and vendor of a steam boiler is only liable to the purchaser for defective materials or for any want of care or skill in its construction; and if after delivery to and acceptance of the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action because of such injury against the manufacturer: *Lossee v. Clute*, *Ib.*, 494.

#### CITIES.

1. A city is not restricted as to the order in which needed improvements shall be made. The necessities of business, and the convenience of travel, may require that one street be macadamized or paved first, and that another be sidewalked first; and the discretion in this respect is properly vested in the Mayor and Council: *Parker v. Challiss*, 9 Kan., 155.

2. A city, in grading its streets, is bound to keep open a sufficient channel for a natural watercourse so as not to obstruct the waters flowing therein; but it is well settled that a city is not bound to construct any channel, culvert, sewer, or drain, to carry off merely surface water. The construction of sewers and drains to carry off

merely surface water is, purely discretionary with a city. It may construct them or not, at its option, and just as it may think best: *Atchison v. Chaliss*, 9 Kan., 603.

3. In an action for damages resulting to a lot owner from a change in the grade of a street, proof of the passage of successive ordinances, first establishing the grade and then changing it, with plaintiff's testimony that he graded the street in each case to conform to such ordinances, and that the grading was done, in each case, under the superintendence of the City Engineer:

*Held*, sufficient, without showing by the record any order of the Common Council to execute the grade, or any published order of the Street Commissioner, or Board of Public Works, directing the owner to do the work: *Church v. Milwaukee*, 31 Wisconsin, 512.

4. The plaintiff had a right to assume that all necessary steps had been taken by the city authorities to render their acts lawful; and the city can not be heard to allege the contrary as against him: *Ib.*

5. The charter of Milwaukee confers upon that city "the general powers of municipal corporations at common law," and expressly authorizes it to "lease, purchase and hold real and personal estate, sufficient for the convenience of the inhabitants thereof." It also confers the right to acquire land for streets, etc., by an exercise of the right of eminent domain:

*Held*, (Lyon, J., dissenting,) that the city might lease land for temporary use as a public street, when the convenience of the inhabitants required: *Gillman v. Milwaukee*, *Ib.*, 563.

6. Where the city, for such a purpose, took a lease of land for one year, and neglected at the end of the year to quit and deliver the possession, but continued to hold, use and occupy the land:

*Held*, that the same rule should apply as in ordinary cases, and the lessor might, at his option, consider the city as a tenant from year to year, upon the terms of the lease: *Ib.*

7. A court will not take judicial knowledge of the number of wards into which a city is divided: *Maberry et als. v. City of Jeffersonville et als.*, 38 Ind., 198.

#### CHAMPERTY.

A contract or agreement in and by which one party employs another to prosecute and collect a claim for him and against the Government of the United States, and for which service the employer agrees to pay the other party twenty per centum on the amount of said claim when collected, is champertious in its value, and against public policy, and void: *Jones v. Blackridge*, 9 Kan., 562.

#### CHANCERY JURISDICTION.

1. A bill to remove a cloud lies, though the complainant has an immediate right to bring ejectment against the defendant: *Thompson v. Mebane*, 4 Heiskell, 371.

2. The insufficiency of the proof to sustain a decree is not a ground on which it can be attacked for want of jurisdiction, by a bill filed for that purpose: *Martin v. Porter*, *Ib.*, 470.

#### CHANCERY PLEADING.

1. On a bill for an account of the value of land sold, as advancements, and containing no charge of fraud or undue influence, relief can not be had by setting aside, on the ground that the sales were obtained by fraud and undue influence, and for an inadequate price: *Merriman v. Lacefield*, 4 Heiskell, 209.

2. A bill which asks immediate relief, will sustain a decree, if it makes a proper case, declaring rights in future, and removing a cloud: *Ib.*

## CHANCERY PRACTICE.

1. The answer of one co-defendant can not be read against another who has no identity of interest with him. The answer of a Sheriff as to an execution lately in his hands, can not be read against the plaintiff in the execution, who has agreed that the proceeds may be applied to the satisfaction of an execution against him: *Turner v. Collier*, 4 Heiskell, 89.

2. Lands decreed to be sold under a mortgage, were brought to sale after the death of the mortgagee, but the case was revived by *sci. fa.*, against his heirs, and the sale confirmed. It seems this was a valid sale, without the aid of the revivor, but with the revivor it was clearly good: *Bryant v. McCollum*, *Ib.*, 511.

3. That a guardian *ad litem* was appointed, an answer filed, an order for report, proof, and report and order of sale at the same time, is no grounds of exception by a purchaser, to the validity of a sale: *Martin v. Porter*, *Ib.*, 497.

4. A purchaser who has bought after the death of a party to a decree, with knowledge of his death, and who did not ask to be released from his bid at the first term, will not be relieved because of such death, and because for want of confirmation, he has been delayed in obtaining possession for eight months after the sale: *Bryant v. McCollum*, *Ib.*, 511.

5. It is usual in sales under decree, not to vest the title until the purchase money is paid, but it may be done, retaining a lien to secure the purchase money: *Ib.*

6. The proper mode of setting aside a sale for matter not in the record, is by petition, and not by exceptions to the report: *Ib.*

7. The owner of land sold at a judicial sale is entitled to receive the rent as against the purchaser until confirmation: *Armstrong v. McClure*, *Ib.*

## CHARITIES.

1. Under the Revised Code of this State, our Courts of Chancery have jurisdiction to carry into effect charitable bequests, the objects of which are definite and specific, and capable of being executed: *Newsom, Ordinary, et als. v. Starke, Admr., et als.*, 46 Ga., 88.

2. In determining what bequests for charitable purposes are definite and specific, and capable of being executed, the Court is to be guided by the well settled rules of the Court of Chancery in England, in the exercise of its inherent chancery jurisdiction, over charities, as distinguished from its jurisdiction as the agent of the King in the exercise of his prerogative power to direct and give effect to indefinite charitable bequests: *Ib.*

3. A bequest to the Inferior Court of a county of a sum of money to be placed in the hands of four men, who are to give bond and security, whose duty it shall be to loan out said amount and pay over the interest annually to the Inferior Court, to pay for the education of poor children belonging to the county, and providing no part of the principal shall be used for that purpose, is, according to the well settled rules for the exercise of the inherent power of a Court of Chancery over charities, sufficiently definite and specific in its objects, and sufficiently capable of execution to authorize our Courts of Chancery to give it effect: *Ib.*

4. It is the duty of the Inferior Court, on its acceptance of the trust, in such case, to appropriate the money, as directed, and if any difficulties arise, or any uncertainties exist, as to the precise object, or as to the mode of applying the fund, to apply to the Chancellor, who will direct by decree, the leading details of the scheme to be adopted: *Ib.*

## CHATTEL MORTGAGE.

One C., an infant, executed a chattel mortgage upon his horse to defendants to

secure a prior indebtedness. Upon the same day he sold and delivered the horse to plaintiff, and refused to deliver it on defendants' mortgage. After the mortgage became due defendants took the horse from plaintiff's possession; shortly after, C. became of age, and then ratified the bill of sale to plaintiff by indorsement thereon. In an action to recover possession of the horse:

*Held*, that defendants were trespassers in taking the horse, and plaintiff was entitled to recover: *Chapin v. Shafer*, 49 N. Y., 407.

#### CHILDREN.

The word children is a word of purchase and not of limitation, where there is nothing to control this sense of the word: *Bowers v. Bowers*, 4 Heiskell, 293.

#### CLAIM AND DELIVERY OF PERSONAL PROPERTY.

In an action to recover the possession of personal property, where the property has a usable value, the value of its use, during the time of its detention, is a proper item of damages: *Allen v. Fox*, 51 N. Y., 562.

#### COMMISSION MERCHANT.

It seems, that in the absence of restrictions from his consignor, a commission flour merchant has the authority to warrant the quality and condition of flour sold by him: *Randale v. Kehler*, 60 Me., 37.

#### COMMON CARRIERS.

1. If A. has property upon which he has received advances from B., under an agreement that he will ship it to B. to be sold to pay the advances, or to pay any indebtedness, he may or may not comply with this contract. He may ship to C. or to B. upon conditions, but if he ships to B. in pursuance of his contract, the title vests in B. upon the shipment. The highest evidence that he has so shipped is the consignment and unconditional delivery to B. of the bill of lading. But if A. retains the bill of lading, and notifies B. by letter that he has shipped the property for him in pursuance of the agreement, or if in any other manner the intent thus to ship is evinced, the title passes as effectually, as between them, as if the bill of lading had been delivered: *Bailey v. H. R. R. R.*, 49 New York, 70.

2. Where, therefore, goods are so shipped, and the carrier receipts for the same, and agrees to transport safely and deliver to B., the former is chargeable with knowledge of the rights of the latter, and if by the subsequent direction of A. he delivers the goods to another person, he is liable to B. for a conversion thereof: *Ib.*

3. When one who is not in business as a common carrier, but who is the owner of a canal boat used generally in the transportation of freight for himself, applies to a common carrier who has knowledge of the facts and receives a load of freight, such owner is not subject to liability as a common carrier. The fact that the common carrier, as such, contracted with others for the carriage of the freight, and that the owner of the boat was aware of this, does not affect the liability of the latter. His liability is determined by the business in which he is engaged, and the character of his own employment, not that of his employer: *Fish v. Clark*, *Ib.*, 122.

4. To sustain an action against a common carrier for a failure to deliver goods, the plaintiff must be the owner thereof, or have some special interest in them: *Thompson v. Fargo*, *Ib.*, 188.

5. *Prima facie*, the consignee is the owner. If the goods are ordered of the consignor by the consignee stating where, but not how, to send them, the consignor has sufficient title to maintain the action: *Ib.*

6. A common carrier of animals is not an insurer against injuries resulting from

their nature and propensities, and which could not be prevented by foresight, diligence and care. Where they are transported under a special agreement, the liability of the carrier is to be determined by the agreement. He is only liable for the performance of the duty undertaken thereby or for some wrongful act either willful or negligent: *Penn v. B. and E. R. R. Co., Ib., 204.*

7. Defendant received from plaintiff five car loads of cattle, to be transported from Erie to Buffalo under a written agreement, by the terms of which plaintiff assumed all risks of injuries "from delays, or in consequence of heat, suffocation, or the ill effects of being crowded on the cars;" the agreement provided that plaintiff should load and unload the cattle at his own risk, the defendant furnishing assistance as required; an agent of the owner was to ride free and take the care and charge of the stock; the cattle were in charge of such agent. At Dunkirk the train was detained by a snow storm three days. The cattle could have been unloaded by constructing a platform; this defendant declined to do, and they remained in the cars twenty-four hours, in consequence of which three of the cattle died and others were injured:

*Held*, that under the contract the duty of defendant had respect simply to the transportation and not to the care of the cattle while *in transitu*; that provision for loading and unloading had reference to the terminus of the transportation and not to an intermediate station, and defendant was not required to unload at Dunkirk or furnish facilities for so doing; that the injury was attributable to the negligence of the plaintiff's agent (Peckham, J., dissenting): *Ib.*

8. In an action against a common carrier, the question as to what is reasonable time for a consignee of goods to remove them after notice of their arrival, where there is no dispute as to the facts, is a question of law for the court. A submission of the question to the jury is error, and, in case the jury finds different from what the law determines, it is ground for reversal: *Hedges v. A. R. R., Ib., 223.*

9. A consignee can not, after notice of the arrival of property for him, defer taking it away while he attends to his other affairs. It is his duty, at once, and with diligence, to act upon the notice, to seek delivery, and continue until delivery is complete. So much time as he gives to his other business, to the neglect of taking charge of the property and removing it from the custody of the carrier, can not be allowed to him in estimating what is reasonable time in which to take delivery: *Ib.*

10. Where, by the contract with a common carrier, he is exempted from liability for loss or damage, unless the same be proved to have occurred by fraud or gross negligence of him, his agents or servants, in an action against such carrier the *onus* is upon the plaintiff of proving such fraud or negligence. Negligence must not only be shown, but it must appear to have caused, or at least contributed to the injury. A defendant in such an action has a right to rely upon his exception to an erroneous ruling of the court as to the burden of proof and to decline to introduce further evidence, and the decision will not be sustained upon the ground that the evidence as it stood showed negligence: *Cochran v. Dinsmore, Ib., 249.*

11. Defendant received of plaintiff at Newark a car load of sheep, to be transported to Albany under a contract which contained a clause by which plaintiff agreed to go or send some one with the sheep "who would take all the risks of personal injury from whatever cause, whether of negligence of defendants, its agents, or otherwise." After the sheep were loaded, plaintiff, who was intending to accompany them, and had a drover's pass, in passing by the tender of the engine, was injured by a stick of wood negligently thrown therefrom:

*Held*, that, under the contract, defendant was exempted from liability: *Poucher v. N. Y. C. R. R., Ib., 263.*



12. Plaintiff went with his baggage to defendant's depot in Philadelphia to take passage to Chicago; upon presenting his baggage, the baggage-master, in accordance with a rule of the defendant, declined to check until plaintiff had procured his passage tickets; in his absence the baggage-master caused it to be placed in the baggage car, and on plaintiff's return with tickets, the baggage-master refused to give him the checks without his paying extra compensation on account of extra weight beyond what, by defendant's regulations, the tickets purchased would carry free. Plaintiff refused to pay the extra charge and demanded his baggage; this the baggage-master refused to deliver, for the reason that it was covered by other baggage, and in order to reach and return the trunks it would delay the train beyond the time fixed for starting. Plaintiff declined to take passage without his checks; his baggage was taken through to Chicago, and on the night after its arrival was destroyed by fire. The action was for the conversion of the baggage:

*Held*, that defendant did not occupy the position of common carrier of the plaintiff, and could not avail itself of any of the rules which have been established as to the liabilities of common carriers of passengers. Also, that defendant was liable for the acts of the baggage-master, though that act should be held wrongful. It was further held by Folger, J., (Allen, J., concurring,) that the question whether the reason given for the retention of the baggage was a sufficient qualification of the refusal to deliver, to rebut the evidence of conversion furnished by such demand and refusal, was a question of fact for the jury. By Church, Ch. J., and Rapallo, J., that as matter of law there was no conversion. By Grover and Peckham, J. J., that as matter of law there was a conversion: *McCormick v. P. C. R. R.*, *Ib.*, 303.

13. A common carrier has not performed his contract as carrier until he has delivered or offered to deliver the goods to consignee, or done what the law esteems equivalent to delivery. When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them; and if a reasonable and diligent effort is not made, the carrier is liable for the consequence of the neglect. What is due and reasonable effort depends upon the circumstances of each case, and is a question of fact for the jury: *Linn v. N. J. S. Co.*, *Ib.*, 442.

14. Where, because of neglect of the carrier to find the consignee, and the consequent delay in delivery of the goods, they have depreciated in value, the fact that the consignee, after receiving notice, neglects to remove them in a reasonable time, does not raise a question of concurrent negligence. After such notice and reasonable time, the goods are at the risk of the owner, and the carrier is not liable for subsequential depreciation. The duties of carrier and consignee are not concurrent, but in succession, that of the latter growing out of the performance of duty by the former, and their acts of negligence can not contribute to the same injury: *Ib.*

15. Where a common carrier has transported freight under a special contract limiting his common law liability, and by which he undertook, for an agreed compensation, to carry it to the terminus of his route, and then deliver it to another carrier, no authority results from the relation or from the contract, empowering him to enter into a special contract on behalf of the owner with the next carrier, limiting or restricting the liability of the latter; the whole duty of the first carrier terminates with the delivery of the goods to the second, and the common law liability of the latter attaches at once by necessary implication upon the receipt thereof: *Babcock v. L. S. and M. R. R.*, *Ib.*, 491.

16. When a carrier undertakes, for a specified compensation, to transport over his own route, and to deliver at the terminus thereof, goods marked to a consignee beyond such terminus, a through contract will not be implied from the fact that in

the description of the goods in the contract, the marks, showing the ultimate destination, are given. Nor is such a contract extended, or affected, by the fact, that in making it a printed blank is used, adapted to a through contract extending over other and connecting lines and making the contract to read ostensibly for and on behalf of all the carriers over whose lines the goods may pass. The written portions of the contract will control, and only so much of the printed matter in the blank form used as is consistent therewith is of any effect; all that is compatible with or inappropriate to the extent of the parties, as indicated by the written portions, is to be rejected: *Ib.*

17. Where a common carrier contracts for the transportation of freight over his route, and for the delivery thereof to another carrier, to be forwarded over connecting lines to its ultimate destination, the fact that the contract fixes the price for the entire carriage does not make the contract a through contract, so as to entitle the succeeding carriers to the benefit of exceptions from liability contained in the contract: *Ætna Ins. Co. v. Wheeler, Ib., 616.*

18. Where there is an agreement between two common carriers, operating connecting lines, for the carriage of freight over both routes at an agreed price to be divided between them, and where they have, at the point of connection, a warehouse used in common for the transfer of freight from one line to the other, the expenses of handling being paid in common, a delivery of freight at the warehouse by one common carrier destined to pass over the line of the other, with notice to the latter of its arrival and ultimate destination, places it in the possession of the latter, and imposes upon him the duties and liabilities of a common carrier in reference thereto: *Ib.*

19. A carrier is not liable for goods lost beyond the end of his route, unless by special contract: *Skinner v. Hall, 60 Maine, 477.*

20. Defendants contracted to transport a quantity of barley for plaintiff from Albany to Baltimore to be delivered in good order, the dangers of the seas alone excepted. There were two customary or usual routes—one, the inside or canal route, the other, outside or ocean route. Defendants' vessel took the latter, and the barley was injured by a peril of the seas. In an action to recover the damages, plaintiff offered to prove in substance that defendant, before signing the bill of lading, knowing that plaintiff designed to effect an insurance, and that it was necessary to effect that purpose to designate the route, agreed to transport the barley by the inside route; that relying upon such agreement, he caused the barley to be insured by that route, and in consequence of the taking of the other route, lost his insurance and suffered the damage claimed. The evidence was objected to and excluded:

*Held*, no error; that by the contract defendants had the choice of routes, and it was not competent to vary it by parol, nor was the evidence competent by way of estoppel: *Weite v. Ashton, 51 New York, 280.*

21. A common carrier is not concluded by the statement in a bill of lading of the amount of goods delivered to him. It is *prima facie* evidence merely, and may be explained or contradicted by parol evidence: *Abbe v. Eaton, Ib., 410.*

#### COMMON LAW.

The common law of England is in force in this State only so far as it is in harmony with its institutions, and its principles applicable to the state of the country and the condition of society: *Powell v. Sims, 5 West Virginia, 1.*

#### COMPROMISE AND SETTLEMENT.

Where two persons, claiming title to the same piece of land, enter into a negotiation and settlement, in pursuance of which one accepts a conveyance of the land from

the other, and mortgages it back to secure payment of a certain sum as purchase money, the mortgagor can not resist a foreclosure on the ground that he had a perfect title before accepting such conveyance, and therefore the mortgage was without consideration, unless he can show that such settlement was procured by fraud in the mortgagee, or through some serious mistake of fact on his own part: *Kercheval v. Doty et al.*, 31 Wisconsin, 476.

#### CONFEDERATE MONEY.

1. The payment of the debts of the decedent, which were created before the war, by an administrator, out of his own funds collected from debts due him prior to the war, in Greenbrier County, in the years 1862 and 1863, at the instance and request of the widow and heirs, and with a view to save the real estate from being sold during the war (the personalty being exhausted), in Confederate Treasury notes, is a valid payment or advancement, for which the administrator is entitled to be reimbursed out of the real estate descended: *Surber's heirs v. Kent, Paine & Co.*, 5 West Va., 96.

2. C., as executor, received payment in Confederate Treasury notes, in Greenbrier County, in satisfaction of a bond for the amount of legacy ordered to be loaned, and so loaned by him, before the rebellion, without any coercion on the part of the debtor. He invested the same in Confederate bonds at the instance of counsel. He seeks to be relieved upon the ground that he acted under advice, and as a prudent man would have done, etc.:

*Held*, he is not entitled to relief, because it nowhere appears that he was compelled to receive the fund by the coercion of the debtor. The investment in Confederate bonds was, *per se*, wholly illegal; and no court ought to excuse or exonerate a trustee or fiduciary, from loss or liability resulting from their acts, which were in themselves not only illegal, but in contravention of public policy: *Copeland, Ex., v. McCue et al.*, *Ib.*, 264.

3. A case re-asserting the doctrine decided in *Beard v. Livesay*, 4 W. Va., 637, that a note executed after the war, in lieu of, or in renewal of, one executed in Greenbrier County in 1861, the consideration of which latter was Confederate Treasury notes, is valid and binding on the promissor: *McLaughlin, adm'r, v. Beard & McNeal*, *Ib.*, 538.

#### CONSOLIDATION (OF SUITS).

The rule for the consolidation of suits is alike in equity or at law, and the matter is always addressed to the discretion of the court. The proper mode for bringing the subject to the attention of the court is by motion for a rule to show cause why the suits or actions should not be consolidated: *Beach v. Woodyard*, 5 West Va., 231.

#### CONSTITUTION.

Where the terms of a written constitution are clear and unambiguous, and have a well understood meaning and application, effect must be given to the intent of its framers as indicated by the language employed. The operation and effect of the instrument will not be extended by construction beyond the fair scope of the terms employed, merely because the more restricted and literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be to some extent within the reasons which led to the introduction of some particular provision, plain and precise in its terms: *Settle v. Van Evrea*, 49 New York, 280.

#### CONSTITUTIONAL LAW.

1. The issuing of executions by the Comptroller-General, to collect the public revenues due to the State, is the act of the Executive department of the government; and the Courts have no power to prescribe the kind or sufficiency of the evi-

dence which shall be necessary to authorize the process of execution to issue against defaulting officers or agents, or to restrain that department in pursuing this course: *Scofield et al. v. Perkerson et al.*; *Hinton et al. v. Rame*, 46 Georgia, 350.

2. Statutes which allow the benefits resulting to a land owner from the construction of highways across his land to be offset against the value of the land taken to make such improvements, and the injury done to his adjoining lands, and provide that if the benefits exceed the damages, the balance shall be assessed upon his land—are valid as an exercise of the taxing power: *Hatton v. Milwaukee*, 31 Wisconsin, 37.

3. The legislature can not legally and constitutionally exercise the right of taxation in such manner and to such extent as to compel or coerce the citizen to aid in the establishment of purely private enterprises or objects, nor for the payment of municipal bonds issued in aid of such private enterprises; and statutes enacted for such purposes are unconstitutional and void: *In the United States Circuit Court for the District of Kansas: National Bank v. City of Iola*, 9 Kan., 689.

4. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests, it ceases to be taxation, and becomes plunder: *Ib.*

#### CONTESTED ELECTIONS.

The right to contest an election is not a vested right. Given by one legislature, it may be taken away by another: *Gilleland v. Schuyler*, 9 Kan., 569.

#### CONTRACTS.

1. When the language of a contract is such as to impose a personal liability, and there is nothing therein indicative of a different intent, the addition to the signature of the contracting party of the words "special committee" does not affect his liability; nor does the fact that he was, at the time, to the knowledge of the other party to the contract a "special committee" appointed by a bank, with authority to execute the contract on its behalf, and that he intended simply to contract as such committee; inasmuch as he does not carry out his authority or intent, but executes an agreement not binding upon or giving any rights of action against the bank, his mistake, as to the legal effect of the instrument, can not deprive the other of his remedy, without fault or fraud upon his part: *Orchard v. Binninger*, 51 New York, 652.

2. A contract made between the Mayor and Council on one side, and City Treasurer on the other, that the Treasurer may use the funds of the city and pay a percentage therefor, is illegal and void, and does not authorize the Treasurer to use the funds: *Manly v. City of Atchison*, 9 Kan., 358.

3. A loan by a wife to her husband of money she had at the time of her marriage or has since acquired as the earning of her personal labor and services, creates a valid indebtedness against her husband. A subsequent payment of such loan by the husband works no fraud upon creditors, and creates no trust in their favor: *Monroe v. May*, *Ib.*, 466.

4. In this State, a married woman may contract and be contracted with, concerning her separate real or personal property; sell, convey and incumber the same, and sue and be sued with reference thereto, in the same manner, to the same extent, with like effect, and as freely as any other person may in regard to his real or personal property: *Knaggs v. Mastin*, 9 Kan., 532.

5. On November 13, 1869, A. contracted with the plaintiff, bridge company, to furnish materials and build two granite piers of Hallowell granite, according to

certain specifications, for fourteen dollars per cubic yard, five hundred dollars to be paid down, and five hundred dollars monthly, until the piers shall be completed and accepted, when the balance is to be paid, and all to be completed before the following spring freshets. Thereupon A. procured the blocks of granite, hauled them upon the land leased by him near the contemplated location of the bridge, and commenced dressing and fashioning them. The plaintiff duly paid the first four installments, and before the next one became due, and before any of the granite was placed in the piers, it was attached by A.'s creditor. In replevin by the bridge company:

*Held*, that the plaintiffs acquired no title by virtue of the contract and the payments made, or any rights or interest in the granite as against the attaching creditor: *Fairfield B. Co. v. Nye*, 60 Maine, 372.

6. *Also held*, that the bridge company could not hold the stone as against the attaching creditor by virtue of an absolute bill of sale thereof from A. to the company, the consideration of which was the four payments made in accordance with the terms of the original contract: *Ib.*

7. It is a general rule that contracts are void which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute (even where such statute does not expressly declare them void); and a party, who is obliged to trace through such a contract his right to a debt alleged to be due him, can not recover: *Melchoir v. McCarty*, 31 Wisconsin, 252.

8. Where two parties contract, one to do a particular piece of work and the other to pay for it, the latter may, at any time, countermand the completion of it, in which case the former will be entitled only to pay for his part of performance, and compensation for his loss on the remainder of the contract: *Collyer & Co. v. Moulton et al.*, 9 Rhode Island, 90.

9. If the parties ordering such a piece of work are in partnership at the time it was ordered, they remain joint contractors, so far as the party from whom it was ordered is concerned, after a dissolution of the co-partnership. Either of them has a right to countermand the order before completion, whereupon the joint contractor remains liable as before stated: *Ib.*

10. A simple contract agreement, so long and so far as the contract remains executory and before breach, may be annulled by agreement of all parties; but after it has been broken and a right of action has accrued, it can only be released for a consideration, so far as it is an executory contract, the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other: *Ib.*

11. *Hence*, where M. and B., co-partners, ordered a certain piece of work of C., an agreement made between C. and M., after the dissolution of this co-partnership between M. and B., that M. should be released from his liability for the work already performed, would be void for want of consideration, where no promise was made on the part of the other partner B. to assume the liability. But such promise, if made by B., would have made a valuable consideration for the release, one debt having been substituted for the other: *Ib.*

12. A bill filed by an agent to obtain compensation for running cotton, during the war, from the Confederate to the Federal lines, and there making sale of it, can not be maintained: *Rhodes v. Summerhill*, 4 Heiskell, 204.

13. Knowledge on the part of a lender that money was borrowed for an illegal purpose, does not affect his right to recover, unless it was his object and purpose that it should be so used: *Bond v. Perkins*, *Ib.*, 364.

14. A contract for a horse, showing on its face that it was intended for service in

the Confederate States cavalry, is not void for illegality, if the contract was made within the Confederate lines: *Gardner v. Barger, Ib.*, 668.

15. Defendant contracted to sell and deliver plaintiff, at Brooklyn, within three months, 400,000 brick at \$10.50 per thousand. Defendants delivered 213,500 during the specific time. In an action to recover damages for the non-delivery of the residue:

*Held* (Peckham, J., dissenting), that the delivery of the entire quantity was a condition precedent of the right of defendants to demand payment, and the fact that, when they discontinued the delivery, plaintiff had not paid for those delivered, was not an excuse for the non-delivery of the residue; also, that it was not necessary, as a condition precedent to a right of action, for plaintiff to make a formal demand of the brick, and tender payment therefor at the place of delivery; that it was enough if he was ready and willing to receive and pay on delivery; nor was it necessary that plaintiff should have had, during the whole time specified, a sum of money on hand sufficient to pay the whole purchase price; it was sufficient if he had the means and resources at command which would have enabled him to pay if the brick had been delivered: *Mount v. Lyon*, 49 New York, 552.

#### CONVERSION.

1. Where the holder of warehouse receipts for grain delivered them to the warehouseman in pursuance of a contract to sell him the grain for cash, such delivery of the receipts vested in the warehouseman the title to the grain, subject to a right in the vendor to reclaim the property on refusal of payment: *Fenelon v. Hogoboom*, 31 Wisconsin, 172.

2. The receipts were taken from the warehouseman's possession by an officer under an attachment against the goods of a third person; and in an action against the warehouseman for a conversion of the wheat, he offered in evidence the record in the attachment suit:

*Held*, that it was immaterial, unless accompanied by proof that the attachment defendant owned the wheat: *Ib.*

3. The abuse of a lawful possession may constitute a conversion: *Neal v. Hanson*, 60 Maine, 84.

#### CONVEYANCE.

1. If one having no title to land, conveys the same with warranty to A. by a deed which is duly recorded, and he afterwards acquires a title and conveys to B., the purchaser of B. is estopped from averring that the grantor was not seized at the time of his conveyance to A. the first grantee. The after acquired title will feed the estoppel created by the conveyance to A., and conclude the grantor and all persons claiming under him. And this, although the deed to A. was a deed poll, notwithstanding the *obiter dictum* in *Gordon v. Greene*, 5 R. I., 104: *McCusker v. McEvey*, 9 Rhode Island, 528.

2. The right of the purchaser of A. to insist on the estoppel is not impaired by admitting, in an action for the possession of land, that A.'s grantor had no title when he conveyed to him: *Ib.*

3. The holder of a majority of the stock in a corporation known as "The Proprietors of Central Bridge," held their stock in trust for the city of Providence. At a meeting of the corporation, they voted to deed their corporate property to the city of Providence, in consideration of the payment by said city of their debts, (not exceeding \$4,000,) and refused to accept an offer of \$5,000 made by a third party:

*Held*, that the purchase was equitably that of a trustee to himself, and consequently the deed was void: *Wilson v. Proprietors of Central Bridge et al.*, *Ib.*, 590.

4. A conveyance by one tenant in common of his interest in distinct parcels of a common estate, is valid as between the parties to it, although it will not bind his co-tenants to whose interests it is prejudicial: *Crocker v. Tiffany, Ib.*, 505.

5. The acknowledgment of a deed of trust taken by the grantee therein as Notary Public, is void: *Dail v. Moore*, 51 Mo., 589.

6. A deed can not be read in evidence without some proof of its execution: *Ib.*

7. The removal of a son to certain land, on the faith of a promise by his father to give him the land, the father being at that time in good circumstances; and the fact that afterwards the son parted with said land for the purpose of effecting the exchange, is a valuable consideration to support a conveyance by the father to the son of other lands; even though at the time of the latter conveyance, the father had become insolvent: *Rumbold v. Parr, Ib.*, 592.

8. In a suit on a covenant of warranty where plaintiff held by a title adverse to defendant, he will not be compelled to show an eviction in order to recover. If he prove that the title purchased was a good one and superior to his own, and that it was purchased at a fair and reasonable price, that is sufficient. The measure of damages in such a case is the amount paid for the outstanding title, if it does not exceed the price originally paid for the land: *Hall v. Bray, Ib.*

#### CORPORATIONS.

1. A stockholder in an insurance company, the charter of which provided, at the time he purchased his stock, "that the stockholders should not be liable to any responsibility further than the amount of their respective shares and interest thereon, for or on account of any damage or loss sustained by said company for or on account of any debt due thereon," can not object to an assessment made upon him under and in conformity to the provisions of chapter 635 of the Statutes, which provides that "whenever the capital stock of any insurance company shall be diminished by reason of losses, or from any other cause, the stockholders of said company, at any legal meeting thereof called for the purpose, may (after making due allowance from the assets of the company of such amount as may be required to re-insure its outstanding risks) assess such further sum as may be necessary to fill up the capital stock to its original amount, upon the several stockholders in proportion to the amount of stock owned by each, and the stock of every stockholder shall be pledged and liable for such assessment," although said named act was passed subsequently to his purchase of stock;—when the General Assembly have expressly reserved to themselves the power in the charter to alter, amend, or repeal it at pleasure: *Gardner v. Hope Insurance Company*, 9 Rhode Island, 194.

2. When a holder of stock in a corporation really holds it in trust for another, but such trust does not appear on the books, and is not disclosed by the trustee, votes of the trustee on such stock, at a corporation meeting, are valid, *at least* where it does not appear that such votes were not in accordance with the wishes of his *cestui*, or that the *cestui* was not content that the stock should stand in the name of the person voting, without any trust be disclosed (compare *Hopkins v. Buffum*, 513): *Wilson v. Proprietors of Central Bridge et al., Ib.*, 590.

3. It does not require a unanimous vote to surrender the franchise of a corporation. One member can not by his objections prevent such a surrender, if it is the wish of the majority: *Ib.*

4. When stock is transferred partly in payment of a precedent debt and partly for a consideration paid at the time, the purchaser will not be regarded as a holder for value as against one having the legal title or a prior equity, so far as the assignment was received in payment of the precedent debt (Grover, J., dissenting), but is

entitled to a lien for the amount of the consideration paid, and to a repayment of that amount, before he will be required to reconvey the stock: *Weaver v. Barden*, 49 New York, 286.

#### COSTS.

Costs on appeal in an action at law are in the discretion of the court only when the judgment is reversed in part and affirmed in part, or when a new trial is granted. The addition to a judgment in this court of the words "with costs," or "without costs," can not affect the right of the prevailing party in such action: *Ayers v. The W. R. Corp.*, 49 New York, 660.

#### COVENANTS.

When in an action of covenant, declaration does not allege the happening of the event or condition upon which the obligation was to become due and payable, it is not error to sustain a demurrer thereto: *Harris v. Lewis*, 5 West Virginia, 575.

#### CRIMINAL TRIALS.

1. Upon a trial in the Court of Oyer and Terminer the court has no power to grant a motion to discharge the prisoner upon the ground that the *corpus delicti* has not been proven. After the trial has commenced the verdict of the jury must be pronounced; but this may be done under the advice and direction of the court. All questions of law arising upon a criminal trial are to be determined by the court; and it is the duty of the jury to regard and abide by such determination. When the case, therefore, presents a question of law only, the court may, and it is its duty to instruct the jury to acquit the prisoner, or direct an acquittal, and enforce the direction; and a refusal to give such instruction or direction in a proper case is error. If the prosecution leave some element necessary to constitute the crime entirely unproved, it is a clear case for the interposition of the court: *The People v. Bennett*, 49 New York, 137.

2. A motive for the commission of the crime can not be imagined; but the facts from which such motive may be inferred must be proven. A suggestion, therefore, in a charge to the jury, of a motive, not warranted by the evidence, which may have influenced their minds to the prejudice of the prisoner, is error. (Grover and Peckham, JJ., dissenting): *Ib.*

#### DAMAGES.

1. Whether interest as well as the highest market price is proper as damages in an action for the conversion of personal property, *quere*: *Groat v. Gile*, 51 New York, 431.

2. Persons conspiring together, by their false and fraudulent representations, causing land to be sold at a sacrifice, will be liable in damages for the injuries done: *Wickerham v. Johnson*, 51 Mo., 313.

3. Where the work of constructing sewers was of such a character as to require the exercise of judgment as to the time when and the mode in which they should be undertaken, and the best plan which the means at the disposal of the corporation rendered it practicable to adopt, the corporation would not be responsible for a defect or want of efficiency in the plan adopted. But where corporations act under authority conferred by the Legislature, and exercise reasonable care and skill in the performance of such work, they are not answerable to adjoining owners, whose lands are not actually taken, for consequential damages to their premises unless there is a provision to that effect in the charter of the company, or in some statute creating the liability: *Thurston v. City of St. Joseph*, *Ib.*, 510.

4. In an action by an individual against a railway company, for injuries claimed to have been caused through the negligence of the servants of the railway company in running a train over the plaintiff, he may (with proper allegations in his petition,) show the nature and extent of his injuries, his sufferings, the length of time he was disabled, the value of his time, his expenses in being cured, his condition with respect to the injuries at the time of the trial, his prospective condition, or rather the effect the injuries will, in all probability have upon him in the future, and this prospective effect may be proved by the professional opinion of the physician and surgeon, who attended him, or by any other competent physician or surgeon, who has made a sufficient examination of the injuries: *K. P. R. R. Co. v. Pointer*, 9 Kan., 620.

5. It is not competent in such a case, for the purpose of showing the injuries, or their character or extent, or for the purpose of enhancing the damages which the plaintiff expects to recover, for the plaintiff to prove his pecuniary or social condition, whether he is rich or poor, married or single, or whether he has a family or not: *Ib.*

6. Successive actions can not be maintained for the recovery of damages, as they accrue from time to time, resulting from an injury to the person, the consequence of a single wrongful act, but the party injured is entitled to recover, in a single action, compensation for all the damages resulting from the injury, whether present or prospective. The limit in respect to future damages is, that they must be such as it is reasonably certain will inevitably and necessarily result from the injury: *Filer v. N. Y. C. R. R.*, 49 N. Y., 42.

7. In an action of trover, interest is as necessary a part of a complete indemnity as the value itself, and in fixing the damages, is no more in the discretion of the Court: *McCormick v. P. C. R. R.*, *Ib.*, 303.

#### DEED.

1. A deed from a principal to his agent, the consideration of which is the execution by the agent of his antecedent duty, will generally be held void by a Court of Equity: *Hoppin, Guardian v. Tobey et als.*, 9 R. I., 42.

2. T. having been entrusted for a considerable time, by the mother of J., with the care and management of her estate, and of that of her children, and having executed after her decease, the duties of executor of her will, and acted as guardian of her children during their minority, was constituted by J., upon his coming of age, his attorney, to have the general care and supervision of all his property of every kind, by a letter of attorney authorizing him "generally to do and perform all acts, matters and things relative to said property and estate," as fully as said J. might do. While occupying said position as attorney, and exercising the authority conferred upon him by the aforesaid instrument, J. executed to him a deed of certain real estate, purporting on its face, to be made for the consideration of ten dollars in money and the further consideration of T.'s past services. The deed was never put on record, but was found by T.'s executors among his papers, upon his decease, some three years afterward:

*Held*, that, though there was no suggestion of any fraud or imposition, or even of any designed excess of any influence acquired by the relation existing between J. and T., to procure the deed, or that it was not freely made by the grantee, yet, under the strict rule of a Court of Equity, the deed ought not to stand: *Ib.*

3. Whether, in any case, where a deed complete in form to convey title has been voluntarily delivered by the person therein named as grantor to the person therein named as grantee, testimony is admissible to show a mere oral agreement that the

deed should not take effect until the grantee had performed some condition named. *Quarre: Kercheval v. Doty et als.*, 31 Wis., 476.

4. If testimony is admissible for such a purpose, it should be received and acted upon with the greatest caution, and the fact should be established beyond reasonable controversy, and not simply by a preponderance of testimony: *Ib.*

5. In this case, the testimony, which was conflicting, is

*Held*, insufficient to establish such a conditional delivery of the mortgage sought to be foreclosed: *Ib.*

6. If the delivery was conditional, yet, defendant having notified plaintiff's agent, two months after the record of the mortgage, that the condition had not been performed, and that this default, if he (defendant) chose to so consider it, invalidated the settlement, and having then continued in possession of the land, claiming title under plaintiff's deed, without notifying plaintiff of any intention to disavow the settlement, or offering to restore to her such title as she had conveyed to him: This is held a waiver of the condition: *Ib.*

7. Subsequent sales and conveyances of portions of said land by defendant, with full knowledge of the non-performance of such alleged condition, and without notice to plaintiff of a disavowal of the settlement on that ground, are also held a waiver of the condition: *Ib.*

8. A tax deed which does not show that the land it purports to convey was sold for delinquent taxes, is void upon its face: *Hubbard v. Johnson*, 9 Kan., 632.

9. In March, 1867, a person who had no title to or interest in a certain tract of land made and delivered to another person a deed of said land, using as words of conveyance, the words "grants, bargains, sells, aliens, releases, quitclaims, and conveys," said deed not containing any claim or covenants of seisin, or right to convey, or warranty of title or possession:

*Held*, that this deed did not estop the grantor from afterward acquiring an interest in said land as against the grantee, and that the after acquired title or interest will not inure to the benefit of the grantee: *Bruce v. Luke*, 9 Kan., 201.

10. A legal title can not vest under a deed before its delivery: *Mitchell v. Bartlett*, 51 N. Y., 447.

#### DEFENSES.

Coverture is not a defense to an action for the specific performance by a married woman of a contract for the purchase of land, where she has a separate estate. Earl, C. dissenting: *Hinckley v. Smith*, *Ib.*, 21.

#### DEMURRER.

Demurrers on the ground of form must be special, and demurrers for duplicity must also state wherein the duplicity consists. This rule, however, does not apply to demurrers to pleas in abatement, which need not be special: *Hoppin and wife v. Jenckas*, 9 R. I., 102.

#### DISCRETION.

The refusal of the Circuit Judge to allow a plea of the statute of limitations to be filed after the trial had commenced, upon affidavit accounting for the failure to file plea earlier, but not verifying the plea, is not error. It is a matter in the discretion of the Circuit Judge: *Clark v. Thomas*, 4 Heiskell, 419.

#### DIVORCE.

1. On the hearing of a petition by a husband, for divorce from his wife on the ground of desertion, the respondent having been absent from him about five years,

it was shown that there had never been any action on the part of the petitioner to induce the respondent to come back to him, and the whole evidence indicated that he did not desire her to come back, and that she did not stay away willfully:

*Held*, that the petition could not be granted: *Thorpe v. Thorpe*, 9 Rhode Island, 57.

2. When S., wife of O. B. S., had obtained a decree of divorce from bed and board and future cohabitation with her husband, and the custody of her children, said decree charging certain real estate of the husband with a fixed annual payment decreed to her for her own use and the support of her children:

*It was held*, that the Court would not, at her suit, pass a decree enjoining creditors of the husband, who had made attachment on said estate and subsequently obtained judgments in the suits in which attachments were made, and who had levied their executions thereon, from proceeding with their executions, nor would the Court declare the liens created in her favor by the decree entered in her petition to have precedence of said attachments or levies, because said attachments were made subsequently to and with notice of the *filing* of her petition, when it appeared that they were made previously to the service thereof: *Spencer v. Spencer*, *Ib.*, 150.

3. *Held, further*, that she was not entitled to such decree, because her aforesaid decree of divorce and alimony were entered prior to the levies made by the defendants on their executions. That the attachments, and not the levies, determined the rights of the parties: *Ib.*

4. Doctrine of *lis pendens* considered. If applicable to petitions for divorce, it is applicable on the ground that the property described, having by the service of the petition been put in litigation, will be held to abide the event of the suit, to prevent the defeat or embarrassment of the litigation by any alienation made or lien acquired *pendente lite*. Hence, notice of such a petition to third persons, who are creditors of the respondent husband, is not, as to such persons, equivalent to service so as to postpone the *bona fide* attachments: *Ib.*

#### DONATIO MORTIS CAUSA.

A gift "*causa mortis*," can not be sustained when there has been no delivery of the subject of the gift claimed, although, at the time it was sought to be made, it was out of the reach of the would-be donor, so that delivery was impossible: *Cuse, Adm'r., v. Denison*, 9 R. I., 88.

#### DOWER.

1. By a conveyance of a register in bankruptcy of the real estate of the bankrupt to the assignee, the title of the bankrupt is divested so that if he dies afterward, and before the sale by the assignee, the widow of the bankrupt is not entitled to dower: *Hill v. Bowers*, 4 Heiskell, 272.

2. In a dower cause in the County Court, all documentary evidence and depositions actually read on the trial, are parts of the record, without bills of exceptions. It is otherwise as to oral proofs: *Ib.*

3. A judgment in an action brought by a receiver in behalf of creditors against the debtor and his wife, setting aside a deed from them to a third person, and a deed from their grantee to the wife, and directing a sale of the premises, where it does not appear that there were any averments in the pleading raising the question of her inchoate right of dower, and no recognition or provision in regard to that right is contained in the judgment, does not operate as an estoppel by record to defeat the wife's claim for dower in the premises upon the death of her husband. (Grover, J., dissenting): *Malloney v. Horan*, 49 New York, 111.

4. The release by a wife of her inchoate right of dower operates only against her by way of estoppel. It must accompany or be incident to a conveyance by another and binds only in favor of those who are privy to and claim under the title created by that conveyance, and if the conveyance is void or ceases to operate, she is again clothed with the right which she has released: (The case of the *Manhattan Co. v. Evertson*, 4 Paige, 457, distinguished, and that of *Meyer v. Mohr*, 1 Robt., 333, questioned), *Ib.*

5. Evidence of the object and purpose for which a conveyance was made, is not admissible to convert the deed purporting to be an absolute conveyance into one of any trust not expressed therein, and the wife of such grantee has a right of dower in the premises: *Gerry v. Stimson*, 60 Maine, 186.

#### EASEMENT.

1. A right of way of necessity, is founded on an implied grant, and created by the necessity of its existence to the enjoyment of the estate granted. Convenience alone is not sufficient to raise the implication of a right of way: *Valley Falls Company v. Dolan*, 9 Rhode Island, 439.

2. Partition of an estate was made by commissioners, and certain lots were set off to the grantors of the plaintiff and defendant respectively. The right to cross the lot set off to the plaintiff's grantor was given to the defendant's grantor, by said commissioners, for certain specified purposes. The defendant subsequently built a barn on the rear of his lot:

*Held*, that he had no right to cross the plaintiff's lot, for the purpose of going to his barn, or for any other purposes than those for which the right of crossing the lot was expressly conferred and granted in the report of said commissioners: *Ib.*

3. Where the owner of a tract of land lays it out into lots, and intersects it with a street or alley for the convenience of the lots, and sells a lot bounding it upon said street or alley, the purchase being made in reference to such convenience, the purchaser acquires an easement in the street or alley which can not be recalled. Such an easement is not lost by mere non-user, and where the non-user is claimed as evidence of an abandonment of the right, it is a question of intent dependent upon the circumstances, and therefore, a question of fact: *Wiggins v. McCleary*, 49 New York, 346.

#### EJECTMENT.

1. A notice of *lis pendens* is unnecessary in an action to recover possession of real property, even as against a purchaser *pendente lite*. The plaintiff in such an action can only recover upon a legal title; it is only against mere equities that a purchaser without notice is protected: *Sheridan v. Andrews*, 49 New York, 478.

2. In an action of ejectment, a sheriff's deed reciting a judgment or levy subsequent to a conveyance, of the property by the judgment debtor, can not be connected by parol with other judgments or levies of date anterior to the conveyance, and proof that the sale was made upon the older as well as the latter judgments or levies: *Edwards v. Miller*, 4 Heiskell, 314.

3. A sheriff's sale without deed only conveys an equitable title, which will not support ejectment: *Ib.*

#### ELECTIONS AND ELECTION LAW.

An election is valid, though there be but two judges appointed or acting. That one of the judges was not present at the polls when elected, and that the clerks were not appointed by the judges, will not vitiate the election where the judges recognized the clerks as properly acting, and both judges and clerks acted during the election,

receiving the ballots, counting the votes, and making the returns without any question by any one as to their authority. They were at least officers *de facto*, and their acts as such can not be questioned collaterally: *Gilleland v. Schuyler*, 9 Kan., 569.

#### EMANCIPATION.

On a sale of negroes by a trustee, under a trust to pay debts, without bill of sale, but with delivery, and a subsequent sale by parol with delivery to a third person, the first purchaser retaining the title until price paid, they being emancipated in the hands of the second purchaser by act of law, and before payment of the price:

*Held*, that the loss fell upon the second purchaser, the retaining of the title operating as a lien: *Planters' Bank of Tennessee v. Vandyck*, 4 Heiskell, 617.

#### EQUITABLE SET-OFF.

A party who has purchased under a proceeding to sell lands in Circuit Court, being entitled on a final division of the estate, of which the land was a part, to more than his purchase money, and the commissioner having obtained judgment for the money, and proceeding to collect it by execution, the purchaser was held entitled to enjoin further proceedings on the judgment: *Parker v. Britt*, 4 Heiskell, 243.

#### EQUITY.

1. A court of equity will relieve against a fraudulent purchase, by converting the purchaser guilty of the fraud into a trustee for those injured: *Jenckes v. Cook*, 9 Rhode Island, 520.

2. Where a party through fraud or misrepresentation induces another to sign a lease, the party so signing will not be estopped from contesting the title of his lessor to the property so released: *Ib.*

3. Where one required the title to premises by fraud, and by the same means induced the owner to attorn to him, a court of equity would declare him a trustee for the true owner. He could not, in such case, invoke the statute of frauds, and claim that agreements, by which the title was obtained, were verbal, and therefore, void under that statute. The statute of frauds was never intended for the protection of fraud: *Damshraeder v. Thias*, 51 Mo., 100.

4. If a defect in a deed is such as to require legal acumen to discover it, whether it appears on the face of the deed or proceedings, or is to be proven *aliunde*, it constitutes a cloud on the title which courts of equity have jurisdiction to remove: *Merchants' Bank v. Evans*, *Ib.*, 335.

5. The Treasurer of the corporation is not a trustee in any such sense as to give the court of equity jurisdiction in controversies between him and the corporation: *Fa. F. & M. Ins. Co. v. Hill*, 60 Maine, 178.

6. When the compensation in damages is the only relief that can be given in cases of an alleged fraud, the court has no jurisdiction in equity: *Ib.*

7. Equity and not assumpsit is the appropriate remedy for one whose membership and consequent right to share in the profits of a partnership are denied, and to whom no portion of the profits have been set apart: *Pray v. Mitchell*, *Ib.*, 430.

8. Although relief will sometimes be granted by a court of equity to one who has not complied with the strict terms of his contract, yet it will only be done in cases where the party seeking it makes out a case free from all doubt, shows that the relief he asks is under all the circumstances equitable, and accounts in a reasonable manner for his delay and apparent omission of duty: *Delevan v. Duncan*, 49 New York, 485.

## EQUITY JURISDICTION.

1. Courts of equity decline jurisdiction in matters of account: First, Where the demands are all on one side, and no discovery is claimed, or necessary; second, where on one side there are demands, and on the other mere payment or set-offs, and no discovery is sought or required: *Lafever v. Billmyer*, 5 West Virginia, 33.

2. If a bill for an account in respect of particular items, fails to sustain the demand upon these particular items, the court will not permit a general vague charge that the accounts are voluminous and intricate, which is inserted mainly as a pretext for the purpose of bringing the case within the jurisdiction of a court of equity to protect a bill against a demurrer for want of equity: *Ib.*

3. B. and P. dissolved partnership by mutual consent. Differences arising, arbitrators are selected to settle them. The award determines that P. shall take certain of the partnership effects and pay liabilities of the firm, and the residue shall be divided between them. The award further provides that P. shall execute an obligation, with security, to B. for the payment of the liabilities and to save him harmless. B. subsequently files a bill, charging that P. had neglected and refused to execute the bond of indemnity, and had neglected to apply the assets to the liabilities, and had fraudulently applied a part of the assets to the payment of his individual debts. The bill asks that the matter be referred to a master to settle the partnership transactions, and also to enjoin certain parties from paying to P. certain sums due for a portion of the partnership effects disposed of by him. *Held*:

I. A court of equity will enforce specific performance of an award, when the thing ordered by the award to be done is such as a court of equity would specifically enforce if it had been agreed upon by the parties themselves.

II. A court of equity will not entertain jurisdiction for specific performance of an agreement respecting goods, chattels, stocks, choses in action, and other things of a mere personal nature, where compensation in damages furnishes a complete and satisfactory remedy.

III. It does not appear in this case that B. can not recover from P. any damages he may sustain by his failure to pay the firm debts, especially as there is no obligation in the bill that he is insolvent, or likely to become so.

IV. No reason is shown for setting aside the award, on the ground of fraud in its procurement, or otherwise.

V. There is no jurisdiction in equity in this case, upon the ground of the settlement of the partnership, as that has already been done according to the terms of the award.

VI. Therefore there was no error in the court below in sustaining a demurrer to the bill: *Burke v. Parke et al.*, *Ib.*, 122.

## EQUITY PLEADINGS AND PRACTICE.

1. A demurrer to an answer is unknown in chancery practice. Where a cause is heard upon the bill and exhibits and answer, without replication thereto, everything in the answer must be taken as true: *Copeland, ex'r, v. McCue*, 5 West Virginia, 264.

2. The Supreme Court, sitting as a court of equity, will send the issue of fact raised by a bill in equity, to a jury for their determination, where the testimony offered respectively by the complainant and respondent is so conflicting, as to leave them in doubt as to the preponderance of proof: *Heath v. Bligh*, 9 Rhode Island, 31.

3. A bill in equity is multifarious when the complainant claims several matters of different natures by the same bill, but is not multifarious when one general right only is claimed, although the respondents may have separate and distinct interests

provided that they have an interest in part in the matters upon the basis of which said right is claimed: *Arnold et al. v. Arnold and wife, Ib.*, 397.

4. A complainant can not join in his bill matters of different natures, although they arise out of the same transaction; but matters homogeneous in their character may be so joined. A complainant may claim the same thing under different titles in the same bill, and the statement of those titles will not render the bill multifarious: *Ib.*

5. To support the objection of multifariousness for different causes of suit alleged against the same person, it is necessary, *first*, that the different grounds of suit be wholly distinct; and, *second*, that each ground be sufficient, as stated, to sustain the bill. If the causes of action arise out of the same transaction or series of transactions, forming one course of dealing and tending to one end, the objection does not apply, and a bill is not multifarious when it does not pray for multifarious relief, although the case stated in the bill might support such a prayer: *Ib.*

6. The object of pleading in equity, as at law, is to confine the trial to the real questions in disputes, and the court will never suffer justice to be defeated by the merely technical forms which are resorted to: *Green v. Harris et al., Ib.*, 401.

#### ERASURES.

Erasures and material interlineations made in a deed after it is acknowledged by the grantor, not in his presence and without his assent, vitiate it and render it null and void: *Deem v. Phillips et al.*, 5 West Virginia, 168.

#### ERROR.

1. A portion of a Judge's charge, objectionable in itself, if explained and corrected by other parts of the charge, so that from the whole the jury could not well be misled, will not be cause of reversal: *Clark v. Thomas*, 4 Heiskell, 419.

2. Where a suit was brought by a vendor of personalty for the property on the ground that it was obtained by a fraudulent purchase in the name of the firm, and the purchase was repudiated by a supposed partner, it seems it was error for the court to instruct the jury that it required the same mutual assent on a condition to re-vest the property, as was necessary to transfer it originally, without giving any instructions as to the effect of fraud and disaffirmance, though no special instruction was asked; the effect of such charge, under the circumstances, being, probably, to mislead the jury: *Mann v. Grove, Ib.*, 403.

3. A party who has consented to a decree, can not avail himself of error committed against another party in the same cause: *Williams v. Neil, Ib.*, 279.

4. Erroneously to overrule a demurrer to pleas which are afterwards negatived by verdict, is not error for which an appellate court will reverse: *Robb v. Parker, Ib.*, 53.

5. A complainant, who has taken and abandoned an appeal, may collect his decree in the court below by execution, and then take a writ of error, and increase the amount of his decree: *Bond v. Greenwald, Ib.*, 453.

#### ESTOPPEL.

1. To establish an *estoppel in pais*, a party must show that the acts, declarations or admissions, out of which he claims the estoppel arises, influenced his conduct, or that he took action in the matter in reliance thereon: *Malloney v. Horan*, 49 New York, 111.

2. An *estoppel in pais* can only be founded upon an assent to or admission of some fact, or the doing of some act. A promise to act is insufficient, and the doctrine can

not be invoked to subvert the principle that prior or contemporaneous agreements, are absorbed in a written contract: *White v. Ashton*, 51 New York, 280.

3. No man can set up another's act or conduct as the ground of an estoppel, unless he has himself been deceived or misled by such act or conduct, nor can he set it up when he knew or had the same means of knowledge of the truth as the other party. Silence only estops when it becomes a fraud. If a man holds title to his lands by deed which has been duly recorded, it is all the notice he is bound to give as long as he remains passive: *Bales v. Perry*, 51 Mo., 449.

4. A judgment in an action of trover against the defendant's warrantee, rendered upon a trial involving only the defendant's title to chattels as against that of the plaintiff, is a bar to an action by the plaintiff against the defendants themselves, involving the same issue, and to be supported by the same testimony: *Atkinson v. White*, 60 Maine, 396.

5. Thus, the owner of a lot of logs conveyed them to the defendants by a mortgage bill of sale, and subsequently, by an absolute bill of sale, to the plaintiff's intestate. Still later, the defendants sold a portion of the logs, and warranted the title to one Conner, who converted them; whereupon the plaintiff sued him in trover for their value. At the trial the only question tried was the strength of the defendants' title under the mortgage as against that of the plaintiff's intestate under the absolute bill, and the defendants recovered judgment. In this action, involving precisely the same question, and depending upon the same testimony:

*Held*, that the judgment in favor of Conner was a bar: *Ib.*

6. When a debtor has paid certain items of his creditor's account, and the creditor subsequently takes judgment for the full amount of the original account, the debtor can not recover back the amount thus paid and wrongfully included in the judgment, his remedy being review: *Hagar v. Springer*, *Ib.*, 436.

#### EVIDENCE.

1. In an action for slander for charging one with adultery, a preponderance of testimony will support a plea of justification: *Ellis v. Brizzell*, 60 Maine, 209.

2. A court that has admitted improper evidence should, at the earliest moment after discovering the error, announce in open court that the evidence has been improperly admitted, and will be disregarded: *Adams v. Dale*, 38 Indiana, 105.

3. The testimony of a witness given in open court, in the presence of the opposite party and other witnesses, and where the witness is subjected to a thorough cross-examination, and where the court or jury have the opportunity of observing the manner, appearance and conduct of the witness, is entitled to greater weight than the evidence of a witness embodied in a deposition, taken in private, and remote from the court and jury, and where all the ordinary tests of truth can not be applied: *Carver v. Louthain*, *Ib.*, 530.

4. The failure of a party to be examined as to matters necessarily within his personal knowledge, affords a presumption against him, where the proof is not clear, and the case he seeks to make, could be proved by him, if true: *Dunlap v. Haynes*, 4 Heiskell, 476.

5. The widow of a deceased trustee is not a competent witness to prove that her husband in his life-time received a certain sum of trust money, part of which he loaned and the remainder she paid over after his death to the administrator of her husband: *State v. McAuley*, *Ib.*, 424.

6. The declarations of the seller after the sale are not evidence to impeach the sale: *Merriman v. Lacefield*, *Ib.*, 209.

7. Implied trusts are not within the statute of frauds, and the courts will hear parol evidence, showing the facts from which they are sought to be implied: *Alexander, exec'r, v. Alexander*, 46 Georgia, 283.

8. In an action for injuries to the person, any evidence tending to show the character and extent of the injury, and its probable results, and the probability of the return of a disease induced thereby, is competent: *Filer v. N. Y. C. R. R.*, 49 New York, 42.

9. A question, therefore, to a physician, asking him to state, from his experience and medical knowledge, the probability of a recurrence of inflammation in an injured muscle, is competent: *Ib.*

10. So, also, is evidence of a physician as to the probable effect on the general health of the injured person: *Ib.*

11. In the propounding of hypothetical questions to medical experts, it is the privilege of counsel to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the expert's opinion upon the facts thus assumed: *Ib.*

12. Where a witness, in answer to a proper question which is objected to, gives testimony, not called for by it, which is incompetent, but no objection is made to the question or motion to strike it out, it can not be objected to upon review: *Ib.*

13. Copies of original memoranda after proof of the facts therein contained may be read as a statement in detail of what the witness has testified: *McCormick v. P. C. R. R.*, *Ib.*, 303.

14. Plaintiffs contracted in writing to furnish the materials to do certain plastering for defendant upon his building in Buffalo, at so much per square yard. They included in their bills, and charged for the full surface of the walls, without deduction for cornices, base boards, or openings for doors and windows. To support these charges, they proved under objection that it was the uniform, well settled custom of plasterers in Buffalo so to measure and charge:

*Held*, the evidence was proper, the usage not unlawful or unreasonable, and raised a presumption that defendant contracted with reference to the usage: *Walls v. Bailey*, *Ib.*, 464.

15. To meet this presumption, defendant, as a witness in his own behalf, was asked if, at the time of contracting, he had any knowledge of the custom claimed:

*Held*, error, (Peckham, J., dissenting): *Ib.*

16. Where a judgment is obtained against a city in an action brought to recover damages for injuries sustained, in consequence of a failure of a railroad corporation to comply with its contract to keep that portion of the street occupied by its track in good repair and safe for travel, and where the latter has notice of the action and an opportunity to defend, the record of the judgment is competent evidence in an action against it brought by the city, and is conclusive as to its liability, and as to the amount the city is entitled to recover: *Mayor, etc., of Troy, v. T. and L. R. R.*, *Ib.*, 657.

17. A town clerk has no authority or power to certify what are the contents of his record, or what they are in substance or effect. As a certifying officer, he may make only *exact copies* from his records and certify to their correctness as *copies*: *Hopkins v. Millard*, 9 Rhode Island, 38.

18. To support a count in an indictment charging that the defendant "being then and there employed as the agent of one P., did, by virtue of his said employment there and while he was so employed as aforesaid, receive and take into his possession certain bank bills,"—"for and in behalf of said P., and said bank bills did then and there fraudulently and feloniously embezzle," there must be evidence that the defend-

ant was the agent of P., and that, as such agent, he received said bank bills for and in P.'s behalf, and embezzled them: *State v. Snell, Ib.*, 112.

#### EXCEPTIONS.

A party excepting to the conclusions of law of a court or a referee, is not held to the same strict rule as in excepting to a charge. Where a charge is good in part and ill in part, the exception must point out the very part which is ill, so that the court, having its attention specially called to it, may have an opportunity to correct the error; but exceptions to conclusions of law come after the power to rectify has passed from the court to the referee, and the reason for the strict rule in the former case fails: *Newlin v. Lyon*, 49 New York, 661.

#### EXECUTORS AND ADMINISTRATORS.

1. Where a testator provided, by his will, that in the division of his personal estate certain liabilities against it should be adjusted and allowed, *whether barred by the statute of limitations, or otherwise*, and that certain amounts due his estate should be treated as advances in respect of certain of his legatees or devisees, and be deducted as such from their shares or proportions:

*Held*, that his executors were not precluded, by such provision, from pleading the statute of limitations of suits against executors and administrators, in bar of a suit on a note, which was one of the liabilities to be so adjusted and allowed: *Bosworth v. Smith et al., executors*, 9 Rhode Island, 67.

2. Where the person nominated as executor in a will was appointed and filed a bond approved by the Judge of Probate at the time the will was proved, neither the fact that the bond was not such in all respects as is required by the statute, nor that the executor neglected to return an inventory, or settle an account in accordance with his bond, vitiates what he has rightfully done in the discharge of his trust, unless the opposite party has been prejudiced thereby: *Pettingill v. Pettingill*, 60 Maine, 411.

. Where the bond thus filed and approved was conditional for the seasonable return of a true and perfect inventory, for faithful administration according to the will, and for the rendering of a just and true account of his administration within one year—the statute provisions respecting the conditions required must be so far considered as only directory, that the executor may have the benefit of such of his official acts in the premises as are found conformable to the law and the will, and that the account which he has bound himself to render should be considered, and, so far as it is found correct and well vouched, allowed: *Ib.*

#### EXPRESS COMPANIES.

Defendant received from plaintiff a trunk to transport from Baltimore to New York. It gave a receipt, which contained a statement, among other things, that as part of the consideration of the contract, it was agreed that the holder, in case of loss, should not demand beyond the sum of fifty dollars, at which the article forwarded was thereby valued, unless otherwise expressed:

*Held*, that by accepting the receipt and omitting to have a different value expressed, plaintiff assented to the valuation at fifty dollars, and to a limitation of his claim in case of loss, to that sum: *Elger v. Dinsmore*, 51 New York, 166.

#### FENCE.

1. In a township in which the hog law has not been suspended, it is no defense to an action for damages done to a crop by hogs suffered to run at large that the crop is not inclosed by a legal and sufficient fence: *Wells v. Beal*, 9 Kan., 597.

2. The respective owners of adjacent lands may become liable by prescription to maintain specific portions of their partition fence: *Harlow v. Stimpson*, 60 Maine, 347.

3. Thus, in replevin for the plaintiff's oxen, which escaped from his land to the adjoining land of the defendant, and by the latter taken up and impounded, the jury were instructed that if they should find that the owners of the adjacent lands, or their grantors or persons from whom they respectively derived title, severally maintained and supported well defined and specific portions of the line fence for twenty consecutive years, each repairing his own part, recognizing his obligation to do so, it would be a division of such fence by prescription; and thereafter, it would be obligatory upon such owners to keep in repair such portions as they had so severally maintained for twenty years; and that if the jury find that the cattle escaped from the plaintiff's close to the adjoining close of the defendant, over that part of the line fence, which the defendant under the foregoing rule had become liable to keep in repair, which was out of repair, then the restraining and impounding of the cattle by the defendant was unlawful:

*Held*, that the instruction was unexceptionable: *Ib.*

#### FIRE INSURANCE.

1. A condition in a policy of insurance, that no insurance, whether original or continued, shall be considered as binding until the actual payment of the premium, may be waived by parol by the company or its authorized agent, and this waiver may be shown by direct proof that credit was given, or may be inferred from circumstances: *Bodine v. Ex. Fire Ins. Co.*, 51 N. Y., 117.

2. An insurance agent can employ a clerk and authorize him to contract for risks, to deliver policies and renewals, to collect premiums and to give credit therefor, and the act of the clerk in such cases is the act of the agent and binds the company: *Il.*

3. Where a policy of fire insurance reserves to the underwriter the right to terminate the insurance on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term; to cancel the contract it is requisite, 1st, That notice should be given to the assured that the insurance is terminated, not that it will be at a future day; 2nd, That the amount to be returned should be paid or tendered to the assured. He must be sought out and tender made; holding it subject to his call is insufficient. The underwriter must be certain also that the whole "ratable proportion" is refunded. This is a condition precedent, and payment of a less sum does not terminate the insurance: *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 N. Y., 465.

#### FLOWAGE OF LAND.

The flooding of land by artificial obstructions placed in a running stream is a taking of the land, within the meaning of the constitutional provision which requires compensation to be made for private property taken for public use. *Alexander v. Milwaukee*, 16 Wis., 248, distinguished; and *Pettigrew v. Evansville*, 25 Wis., 223, approved: *Arimond v. G. B. & Miss. Canal Co.* 31 Wis., 316.

#### FORMER ADJUDICATION.

Where one party, at the request of another, enters into a contract as surety for the latter, the law implies a promise of indemnity, and the indemnitor is bound by a judgment in a suit brought against such party upon the contract, of which suit the indemnitor has notice, although there is no provision to that effect in his contract; and a foreign judgment has the same effect in this respect as one of our own courts: *Koskoff v. Meyer*, 49 New York, 571.

## FRAUD.

1. A fraudulent affirmation, made by the defendant to the plaintiff respecting the quantity of hay cut the previous year on a farm which the former was about to sell to the latter, will support an action for deceit: *Martin v. Jordan*, 60 Maine, 531.

2. Thus where the parties were on the farm in the winter while covered with snow, examining it with a view to the sale and a short time before the conveyance was made, and the defendant, in answer to a question by the plaintiff, said the farm cut twenty-five tons of hay the preceding year, and the defendant knew the statement was false when he made it, and the plaintiff relying upon it, was thereby induced to purchase and was thereby deceived and injured:

*Held*, that the defendant was guilty of an actionable fraud: *Ib.*

3. An action of tort for deceit in the sale of real estate, does not lie for the fraudulent misrepresentations of the vendor as to the price which he paid therefor. *Kent and Dickerson, J. J.*, dissenting: *Holbrook v. Connor, Ib.*, 578.

4. False and fraudulent affirmations by the vendor of lands that said lands had large deposits of oil in them, and were of great value for the purpose of digging, boring for, and manufacturing oil; accompanied with the statement that the lands had not been tested, are matters of opinion and not actionable: *Ib.*

5. Where a vendor, from whom goods have been obtained by fraud, instead of disaffirming the contract of sale, affirms it by bringing suit thereon and prosecuting it to judgment, neither he nor a receiver, appointed in supplementary proceedings instituted upon such judgment, can set up the fraud in the sale, for the purpose of defeating an assignment of the property made by the vendee, for the benefit of creditors, although the assignment was made in furtherance of the fraud, with full notice thereof on the part of the assignee: *Kennedy v. Thorp*, 51 New York, 174.

## FRAUDULENT CONVEYANCE.

1. The rule that a fraudulent conveyance is valid as between the parties thereto, does not operate to work a merger of a prior lesser estate owned by the grantee when the conveyance has been set aside because of the fraud. To the penalty of the loss of the estate conveyed will not be added the further one of the loss of another interest on the ground of merger: *Malloney v. Horan*, 49 New York, 111.

2. The vendee of lands conveyed in fraud of creditors having died pending a suit to set the conveyance aside and apply the lands to the payment of debts of the vendor, it was held that no revivor as to his personal representative was necessary: *McCutchen v. Pigue*, 4 Heiskell, 565.

## FRAUDS—STATUTE OF.

1. An oral contract between A. and B. to support C., for the remainder of her natural life, is not void by the statute of frauds since it *may* be fully performed within a year from its date: *Heath v. Heath*, 31 Wis., 223.

2. On April 2d, the owner of a large quantity of bark situated on his wharf, billed it to his creditor as security for indebtedness and delivered it to the defendant as his creditor's agent. On April 19th, the bark remaining on the owner's wharf, he bargained it to the defendant for \$650, but made no written memorandum of the bargain, received nothing in payment, and made no delivery of any portion of it; although the defendant subsequently went and measured it of his own motion. On April 28th, the original owner sold and gave a bill of the bark to the plaintiff, who paid for it; and while the bark was being measured, the defendant interfered and claimed it by an alleged sale on April 19th, whereupon the plaintiff replevied it:

Held, that the bargain to the defendant was within the statute of frauds, there having been no delivery or acceptance of the bark; and that the plaintiff's knowledge of the facts would not affect the sale: *Young v. Blaisdell*, 60 Maine, 272.

3. The sale of an interest or of shares in a joint stock company, is within the statute of frauds: *Pray v. Mitell, Ib.*, 430.

#### GIFT.

1. Defendant's testator being the owner of one hundred and twenty shares of bank stock, included in one certificate, made an absolute assignment in writing of twenty shares to the plaintiff. This he handed to his wife, to be kept by her and delivered to the plaintiff upon his death. At the time of executing the assignment the donor was about eighty years of age, in failing health, and so continued until his death, which occurred about five months thereafter:

Held, this was a valid gift, *mortis causa*, that the equitable title to the stock passed by the assignment; that the defendant was trustee for plaintiff by operation of law to make the gift effectual, and that a judgment requiring him to produce the certificate and cause a transfer of the twenty shares to be made to plaintiff was proper: *Grimes v. Howe*, 49 N. Y., 17.

2. One who had entered the military service during the late war, a short time before starting for the army, in which he died, said to a friend, in regard to a gun which he had loaned to that friend, "Well, if I never return, you may keep the gun as a present from me." Upon a suit by his administrator for the recovery of the gun:

Held, that the facts did not make a gift, either *inter vivos* or *causa mortis*: *Smith, Adm'r, v. Dorsey*, 38 Ind., 451.

#### GOLD CONTRACT.

Damages upon a contract to pay gold or its equivalent, are to be computed by adding to the sum contracted for, the premium on gold over Treasury notes at the time the payment is due, and giving judgment for the total with interest to the date of the judgment: *Bond v. Greenwald*, 4 Heiskell, 453; *Wills v. Allison, Ib.*, 385.

#### GOOD WILL.

A good will held to be the probability that the old customers will continue to come to the old place, but, ordinarily, the good will of the business as the vendor used it, and only co-extensive with the business carried on: *Semble*, that a person selling a good will is not prevented from leasing other property he may own in the neighborhood to another person who may carry on the same business, provided there is no collusion, and the lessor has no interest in the business: *Bradford v. Peckham et al.*, 9 R. I., 250.

#### GRANT.

Decision in *Evans v. Dana*, 7 R. I., 306, re-affirmed, that only easements apparent and continuous, and necessary to the proper enjoyment of the part granted, pass by implication of the grant upon the severance of an estate, one part of which has served the uses of another part: *Providence Tool Company v. Corliss Steam-engine Company*, 9 R. I., 564.

#### GUARDIAN.

A widow continuing to carry on the farm of her late husband, in which she was entitled to dower, in 1861-62, some years after his death, raised a crop of cotton with slaves partly the property left by her husband, and partly the property of her chil-

dren, derived from another source. During the year 1863, she went south, where one of her daughters marrying, the son-in-law, as agent of the widow, sold the crop of cotton to defendant, Simmons, March 19, 1864:

*Held*, that the widow was entitled to a share in the crop proportionate to her unassigned dower interest in the land, and her interest in the negroes, and *that* share passed by the sale. That the interest of the married daughter belonged to the husband, and passed by the sale. One of the sons being in the army, knew of the sale, and thought it the best that could be done, and said they had lost nothing by it, nor did he repudiate it until he filed this bill, July 24, 1866. He was under age in 1863, and it did not appear when he came of age:

*Held*, that he was bound by the sale.

Three of the children were minors, and their shares did not pass, and they were entitled in equity to hold the purchaser to account as a trustee, and as he lost part of the property by its being burned, while at the gin:

*Held*, that he should account for their proportion of what he realized.

The widow and her agent having received the shares of the three minors, in Confederate notes, were held to account to the purchaser for their value at the time they were received: *Robertson v. Simmons*, 4 Heiskell, 135.

#### GUARDIAN AND WARD.

1. The specific performance of a contract is a matter not of absolute right, but of sound discretion in the Court, especially where the interests of infants are concerned. Courts of Equity will not interfere to decree specific performance except in cases where it would be strictly equitable—and in granting or refusing such relief will look not only at the nature of the transaction, but to the character of the parties, and if one is a guardian or trustee, the interest of the ward or *cestui que trust* will be considered. The contracts of guardians touching the property of their wards will not be enforced unless they are strictly equitable, and for the interest of the infants: *Sherman v. Wright*, 49 N. Y., 227.

2. An action against a guardian and his ward jointly, will not lie to recover a debt created by the act of the ward before the appointment of his guardian: *Allen v. Hoppin, Guardian, et al.*, 9 R. I., 258,

#### HABEAS CORPUS.

H. summoned before a town council to testify as a witness in a case pending before them, was committed to jail for contempt in refusing to testify. Upon application to the Supreme Court for a writ of *habeas corpus*:

*Held*, that he must be discharged, because no definite term of punishment was named in the warrant of commitment: *In the matter of Hammel*, 9 R. I., 248.

#### HIGHWAY.

1. Towns are not bound to keep highways in a suitable condition for travel in their whole width; and their liability is limited, primarily, to damages caused by defects in the traveled track: *Kelly v. Fond du Lac*, 31 Wis., 179.

2. If a traveler, without necessity, or for his own pleasure or convenience, deviates from the traveled track (which is in good condition), and in so doing, meets with an accident from some cause outside of such track, the town will not be liable for resulting damages: *Id.*

3. But if the traveled portion of the highway is obstructed or dangerous, making it necessary for a traveler to deviate therefrom, and in so doing, he uses ordinary care, the town will be liable for damages accruing to him from an accident caused

by any defect or obstruction in that portion of the highway over which he is thus necessarily passing: *Ib.*

4. The fact that a traveler saw an obstruction or other defect in a highway, and knew its dangerous character, is not conclusive proof that he was guilty of negligence in attempting to pass it. It is, in general, a question for the jury, upon the evidence, whether it was consistent with reasonable care for him to attempt to proceed: *Ib.*

#### HOMESTEAD.

1. A purchase of a homestead with a view of occupancy, followed by occupancy within a reasonable time, may secure *ab initio* a homestead inviolability: *Monroe v. May*, 9 Kan., 466.

2. A man may sell his homestead, and give good title, no matter how many judgments may be standing against him. The proceeds of that sale he may re-invest in a homestead, and though he do not actually occupy until after he has completed his purchase and secured his title, still, if he purchase it for a homestead, and enter into occupation within a reasonable time thereafter, no lien of existing judgments will attach: *Ib.*

3. Where a homestead in law is set apart, the applicant is entitled to the crops growing on the same: *Cor, Marshall & Co., et al. v. Cook*, 46 Georgia, 301.

4. If land be sold and the purchaser indorse the note of a third person to the vendor in payment, and transfer a mortgage to him, securing said note, there is no such novation of the contract, no change in the relation of the parties to each other, as to deprive the vendor of his right to enforce the payment of the purchase money by levy on the land (which has been set apart by the purchaser as a homestead) under execution against the indorser and maker of the note. The land was the consideration given for the indorsement of the note and mortgage. Until they are paid, the vendor's claim for the purchase money is superior to the homestead, and the land may be subjected to its payment: *Lane v. Collier, Adm'r, Ib.*, 580.

#### HUSBAND AND WIFE.

1. A judgment can not be recovered against a woman upon an employment by her, during her marriage, of an attorney to conduct a divorce proceeding for her: *Cook v. Walton*, 38 Indiana, 228.

2. A wife may have full knowledge that her husband is about building a house upon her land, and she may consent thereto, and approve thereof, but this gives the builder no right to acquire a lien upon the property. To render her property liable, she must have done what would have made her personally liable as a *feme sole*: *Copp v. Stewart et al., Ib.*, 479.

3. A married woman may take from her husband a chattel mortgage, to secure the payment of a debt due from him to her upon a sale to him of her separate property: *Beard v. Dedolph*, 29 Wisconsin, 136; *Fenelon v. Hogoboom*, 31 Wisconsin, 172.

4. If husband and wife see fit to treat each other as lender and borrower, the contract of loan carries with it its usual incident of interest, as well with them as with other parties, assuming that there is nothing in the transaction which would make it inequitable to require the payment of interest. In such a case, the wife is entitled to have credit, in an account between her and her husband, for the proceeds of the sale of some of her property, although they have been applied to defray family expenses with her consent and approval: *Hodges v. Hodges and another*, 9 Rhode Island, 32.

5. The testimony of a husband which may tend to criminate his wife, or the testimony of a wife which may tend to criminate her husband, is admissible in a collateral proceeding, provided that no use can afterwards accrue therefrom in any direct proceeding against either of them. But a husband or wife objecting to give such testimony will be entitled to the protection of the court: *State v. Briggs, Ib.*, 361.

6. At common law the husband could assert a right to all personal property rightfully acquired by the wife, and to all of which she possessed herself by his authority, or with his co-operation, but she had no power to thrust such possession upon him by her own wrong without his sanction, or to make him responsible for it against his will and without his knowledge. A delivery of property to her without his assent, would neither create a direct liability on his part to the party delivering, nor would it discharge the latter from a previously existing liability to the husband. The liability of the husband to be sued jointly with his wife for personal property taken and wrongfully converted by her prior to or during coverture did not rest upon the ground that he, in contemplation of law, was guilty of the taking or conversion, but resulted from the incapacity of the wife to be sued without her husband. A married woman alone might be guilty of a conversion: *Kousing v. Manly*, 49 New York, 192.

7. In the absence of statutes varying the rule, jewelry and ornaments presented to a wife are her paraphernalia, and as such are subject to the control of her husband, and he alone can sue for an injury to or conversion of them: *McCormick v. P. C. R. R., Ib.*, 303.

8. Where an action is brought by the husband and wife for a wrong to the wife, there can be no recovery for what is special damages to the husband: *City of Wheeling v. Trowbridge and Wife*, 5 West Virginia, 353.

9. In this case, one count alleged special damages to the husband; another count alleged a case in which the wife was the meritorious cause of action. A demurrer should have been sustained, because the different causes of action were united, and the damages could not be severed: *Ib.*

10. When land is conveyed to a trustee for the sole use and benefit of a married woman, upon his death the use is immediately executed in her, and if she be dead, then in her heirs: *Roberts v Moseley*, 51 Mo., 282.

#### IMPROVEMENTS.

The purchaser of land by parol who has failed to comply with his contract and abandoned the possession without fault of the vendor, is not entitled to recover for improvements put by him upon the land: *Rainer v. Huddleston*, 4 Heiskell, 223.

#### INDICTMENT.

1. An indictment should charge an offense in the words of the statute, or in language equivalent thereto: *State v. Hussey*, 60 Maine, 410.

2. Thus unlawfully and maliciously throwing down a gate, is not equivalent to wilfully and maliciously doing it: *Ib.*

#### INFANCY.

1. A bargain and sale made by an infant husband jointly with a wife of full age, of the real estate of the wife, is voidable at the election of the husband: *Barker v. Wilson*, 4 Heiskell, 268.

2. An infant who is also a married woman has the option to dissent from her deed within a reasonable time after her discoveriture, though her coverture may continue for more than twenty years: *Dodd v. Benthal, Ib.*, 601.

INJUNCTION.

1. An injunction will not be granted to restrain the enforcement of a judgment when it appears by the bill that the court in which the judgment was obtained had no jurisdiction. The remedy at law is complete either by affidavit of illegality, or by action of trespass: *Hart, Receiver, v. Lazaron*, 46 Georgia, 396. \*

2. While it is true, as a general rule, that no judicial interference can be had in any levy or distress for taxes, yet where it happens that the tax collector placed a tax *fi. fa.* in the hands of the sheriff, with instructions to collect the same out of the first money that should come into his hands from the sale of the defendant's property under an execution held by him, and the sheriff did sell property of the defendant for more than enough to pay off the tax *fi. fa.*, under other executions, and application was made to the tax collector for his consent to have this money paid over to such executions, which he refused, and the sheriff thereupon took the responsibility of paying over the money to the levying executions, and then of his own motion levied the tax *fi. fa.*, upon other property of the defendant without instructions to do so from the tax collector, the sheriff will be enjoined from proceeding under the tax *fi. fa.*, at the instance of a creditor of the defendant, who has attached the property last levied on, who states in his bill, that the defendant is insolvent, and that if complainant is deprived of this means of securing this debt by the action of the sheriff, he will lose it, it being apparent that the sheriff levied the tax *fi. fa.* for his own protection and not for the benefit of the State: *Beatie v. Brown et al.*, *Ib.*, 458.

3. Where a bill of injunction to a judgment shows matter sufficient to have defeated a recovery at law, but which defense was not made because not discovered until after judgment, and until it was too late to move for a new trial, it is error to dissolve the injunction, provided a sufficient reason is shown in the bill why the matter of defense was not discovered in time to be set up in the action at law: *Ferrell v. Allen, Ex.*, 5 West Virginia, 43.

4. Although a bill asking for an injunction contains the averment that the defendant, by cutting a channel through plaintiff's land, when he had granted the defendant the right to construct its railroad through his land, would direct the water of a creek from his mill, and work to him *irreparable damage*, yet as there is no averment that the defendant is insolvent, or that its officers, agents, or servants are transcending their authority, or that any damage which may be done to the property can not be adequately compensated, in damages, the injunction must be refused: *Cler. & Ohio R. R. Co. v. Bobbett*, *Ib.*, 138.

5. An order of injunction until a certain day, or until further order of the court, does not expire on that day, unless some further order is made, but continues in force, under the rule of court, until an order is made dissolving it: *Bradford v. Fekhum et al.*, 9 Rhode Island, 250.

6. Where a complainant in a bill in equity excepted to the master, and contended that his exception should be decided, and that he was entitled to a full answer, before a hearing on the motion to dissolve an injunction:

*Held*, that ordinarily, on the coming in of the answer denying the equities of the bill, an injunction is to be dissolved, but not necessarily or of course: *Ib.*

7. On a hearing of a motion to dissolve an injunction, the answer is considered as an affidavit, and the complainant may use counter affidavits, or his exceptions, in argument as to the insufficiency of the answer: *Ib.*

8. The English common injunction, which was granted as of course, on certain defaults of the respondent, and a special injunction granted on special application and oath, distinguished: *Ib.*

9. The administrator of an intestate estate may be enjoined from casting a cloud, by means of a fictitious sale, upon the title of property once held, but subsequently *bona fide* sold by his intestate: *Gerry v. Stimson*, 60 Maine, 186.

10. When the wife of the grantor in a deed which has been delivered, received it for the avowed purpose and with the agreement to join her husband therein, and release her right of dower in the premises, and subsequently refuses to surrender the deed or the consideration for her release, the grantee is the proper party to seek redress, although he has conveyed the premises to another: *Ib.*

11. An injunction will not be granted under the general equity powers of the court to restrain a nuisance, unless the complainant's rights have been settled in a suit at law, or long enjoyed without interruption, or unless there is imminent danger that the threatened injury will result in irreparable damage: *Varney v. Pope*, *Ib.*, 192.

#### INSURANCE.

1. The plaintiff chartered his vessel to sail from New York to San Francisco, thence with convenient dispatch to Callao, thence to the Chincha Islands, and there to take on a cargo of guano for Hamburg or Rotterdam. The defendants thereupon caused the plaintiff to be insured, lost or not lost, several sums respectively, on charter, primage, and property on board, at and from New York to San Francisco. The vessel sailed in accordance with the charter, and was wrecked between New York and San Francisco, and condemned and sold. In an action upon the policy:

*Held*, that the plaintiff's interest in the guano chartered, commenced when his vessel left New York for San Francisco, and that the defendants were liable; and the fact that the plaintiff had, also with the knowledge of the defendants, chartered his vessel to others from New York to San Francisco, and effected an insurance thereon with another company, constitutes no defense, in the absence of any evidence that the defendants were injuriously affected thereby: *Melcher v. Ocean Ins. Co.*, 60 Maine, 77.

2. A fire insurance policy limited the right of action thereon to twelve months after a loss. A loss occurred October 17, 1869, and on the 6th of November following, the parties entered into an agreement, by which the assured was to accept a certain amount (less than what he claimed to be due by the terms of the policy), and the company promised to pay that amount on the 6th of February, 1870, unless it should notify the assured before that time of its intention to contest its liability for the loss. No such notification having been given, nor the amount agreed upon paid, the assured brought this action November 7, 1870:

*Held*, that even if plaintiffs could not recover on the agreement aforesaid, they might still maintain an action on the policy; and the time between November 6, 1869, and February 6, 1870, must be excluded from the period of limitation: *Killips v. Insurance Co.*, 28 Wis., 472, approved and followed; *Black et al. v. Winneshiek Ins. Co.*, 31 Wisconsin, 74.

3. Where a fire insurance policy requires that "in case of a loss, the insured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating," etc., the court are inclined to think, (1) that only the notice, and not the "particular account," is required to be immediate; and (2) that an immediate verbal notice is sufficient: *O'Conner v. Hartford Fire Ins. Co.*, *Ib.*, 160.

4. Where the company declines to receive the proofs of the loss, and to pay it upon the ground of insufficiency or informality in such proofs, or because they are

made out of time, it is bound to disclose to the assured the grounds of such refusal, as then known or believed to exist by its officers or agents having charge of the business; otherwise the objection will be considered as waived: *Ib.*

5. Defendant issued a policy upon an application wherein the applicant stated that the insured was in good health, and usually enjoyed good health; that no circumstance which might make the risk more than usually hazardous was concealed or withheld. To a question, whether the insured had had certain diseases, among them disease of the heart, palpitation, spitting of blood, etc., the answer was "see surgeon's report;" it was also stated that the insured had no physician. The examining physician, in answer to a question whether the insured had cough, occasional or habitual, or expectoration, or occasional or uniform difficulty in breathing, answered "no cough; walking fast up stairs or up hill produces difficulty in breathing." In fact, the insured had raised blood from two to two and a half years prior to and down to his death; a physician had been consulted and prescribed therefor. He had failed in health prior to the application; he died three months after the issuing of the policy, of *pleura pneumonia*. The referee rendered judgment against defendant:

*Held*, there was a fraudulent concealment and misrepresentation of material facts, and an order of the General Term setting aside the judgment was proper: *Smith v. Ana Life Ins. Co.*, 49 New York, 211.

#### INSURANCE COMPANIES.

Where the Auditor of State on the 25th of February, 1871, issued a certificate of authority to an insurance company organized under the laws of another State, authorizing such company to do an insurance business in this State till the 28th of February, 1872, without the company having previously paid the required sum into the State Treasury, but on the day that the certificate of authority was issued the auditor drew his draft on the company for the fifty dollars, which was afterwards duly paid on presentation, and on the 21st of March thereafter the auditor paid the money into the State Treasury:

*Held*, that the auditor acted as the agent of the corporation in drawing the money and paying the same into the State Treasury, and the issue of the certificate before the payment of the money was without warrant of law and was void: *Hartford Fire Insurance Co. v. The State*, 9 Kan., 210.

#### INTEREST.

The owner of land taken for the location of a railroad, is entitled to interest on the amount of the damages, from the time of the taking to the time of assessment: *B. & P. R. R. Co. v. McComb*, 60 Maine, 290.

#### INTERROGATORIES.

Where a set of interrogatories was tendered in evidence, and it appeared from inspection, that the commissioners had taken the answers of the witness as required, that he had sworn to and subscribed to them, that the commissioners had duly attached their names to a proper certificate; that, after this, the commissioners had permitted the witness to add to his answers, adding a new *jurat* and a new certificate, but it did not affirmatively appear that the addition was at the same time and place, and a part of the same transaction:

*Held*, that the addition was not properly a portion of the return: *Western and Atlantic Railroad v. Harris*, 46 Georgia, 602.

#### JOINT STOCK ASSOCIATIONS.

1. Every member of an unincorporated joint stock company, is personally liable for all of its debts: *Frost v. Walker*, 60 Maine, 468.

2. It is sufficient to authorize a finding that persons are members of such company, if it be proved that their names are signed to the subscription paper for its capital stock, and that they paid, without objection, assessments for the number of shares set against their respective names, even though it be not shown by whom their names were so subscribed: *Ib.*

3. By thus contributing to the working capital, the subscribers became entitled to share in the profits of the company, and liable as co-partners, for its debts: *Ib.*

4. It seems that there is no distinction, in respect to their liability, between a subscriber for stock and a stockholder; however this may be, an actual payment of assessments, upon shares subscribed for, will create such liability: *Ib.*

#### JUDGMENT.

1. A judgment being rendered against a Clerk and Master for a liability as commissioner, on his bond as Clerk and Master, the court will presume that there was no bond given by him as commissioner: *Tanner v. Dancy*, 4 Heiskell, 482.

2. In such case the party interested being a minor, the payee being his father, was held entitled to recover for the use of the son, but no one could receive the money but the son if he came of age before payment, or his guardian, if he was still under age: *Barbee v. Williams*, *Ib.*, 522.

3. That complainant had employed an attorney to defend a suit at law, but that said attorney had ceased to attend court, and procured other attorneys to take charge of the case, without knowledge of complainant, and said attorneys, without a correct knowledge of complainant's defenses, and without his knowledge, made an agreement in regard to said suit, and suffered judgment to go against him, without a statement that he had properly informed his first attorney as to his defense, or that proper pleas had been put in, or other facts showing proper diligence, does not make a case on which equity will relieve against a judgment at law to let in a defense available at law: *Chester v. Apperson*, *Ib.*, 639.

4. But, as to matter of usury complicated by reason of repeated renewals, and double charges for advances, as to which the remedy at law would not be clear but embarrassed, a court of equity will relieve after judgment without showing any reason for not making the defense at law, other than such embarrassment: *Ib.*

5. Where after a judgment for plaintiff a motion in arrest is sustained, and the plaintiff given leave to amend his petition, and upon his refusal to amend, the case is dismissed, the dismissal is such a final judgment as will support an appeal or writ of error: *Bowie v. Kansas City*, 51 Mo., 454.

6. Where, under the laws of Tennessee, summary judgment without notice is obtained by the sureties on a bond against their principal, such judgment can have no extra-territorial validity so as to authorize a recovery in this State: *Sevier v. Roddie*, *Ib.*, 580.

#### JURISDICTION.

1. *Of Circuit Court in respect to Wills.* A court of equity may relieve against frauds in the settlement of probate accounts (*McLachlan v. Staples*, 13 Wis., 448); and against fraudulent conveyances executed by administrators under license (*Bassell v. Warner*, 23 Wis., 673); but whether it has jurisdiction to relieve against the probate of a will obtained by fraud, *quære*: *Holden v. Meadows*, 31 Wis., 284.

2. *State and Federal Courts.* The first clause of sec. 35 of the bankrupt law of the United States, which provides that any payment, transfer or conveyance of property, made by a debtor, being in insolvent circumstances, within four months previous to filing his petition, with a view to giving preference to a creditor, shall be void if such creditor, at the time, has reasonable ground to believe that the debtor is in-

solvent, etc., is *penal* in its character; and an action by an assignee in bankruptcy, under said section, to recover the value of goods transferred to defendants by the bankrupt in fraud of the provisions of said act (such transfer being valid by the laws of this State), will not be entertained by the courts of this State: *Brigham v. Claffia et al.*, *Ib.*, 607.

3. Cole, J., is also of the opinion, that the Federal Courts should be held to have exclusive jurisdiction of *all* proceedings under said bankrupt law, including all actions brought by the assignee in bankruptcy, as such: *Ib.*

#### JURY.

Persons residing within the corporate limits, are incompetent jurors to try a suit against the city: *Johnson v. Mayor and City Council of Americus*, 46 Georgia, 80.

#### LACHES.

1. Where, by laches, the remedy at law is barred, and the rights to a specific performance forfeited, there can be no recovery of what has been paid upon the contract: *Finch v. Parker*, 49 New York, 1.

2. A court of equity will not, any more than a court of law, excuse laches and gross negligence in the assertion of a right to a specific performance of a contract. But where time has not been made of the essence of the contract by its terms, although there may not be performance upon the day, if the delay is excused and the situation of the parties and property unchanged, and the party reasonably vigilant, the court will relieve from the consequences of the delays: *Hubbell v. Von Schornberg*, *Ib.*, 326.

3. Statements made by a judge out of court, previous to the commencement of a term, that certain cases will not be tried at the ensuing term, are not judicial determinations, and a party relying upon such statements, does so at his own peril: *M. K. & T. R. R. Co. v. Crowe*, 9 Kan., 496.

#### LAND AND LAND TITLES.

Under an act of Congress, passed May 19, 1828, (4 U. S. stat. at large, 288, § 3,) which provided that writs of execution, and other final process issued on judgment and decrees rendered in any courts of the United States, and the proceedings thereupon should be the same, except their style in each State, as were then (1828) used in the courts of such States, the United States Courts have no right to make any regulations for the government of their marshals in conducting sales under executions at law, different from those fixed by the State laws. There never has been any law of this State, authorizing execution sales of real estate to be made in vacation of the Circuit Court and during a session of a County Court; but our laws have always required such sales to be made during the session of the Circuit Court, excepting under acts creating certain courts of common pleas. It is essential to the validity of such sales, that they should be made during the session of the proper court, and a violation of this rule would render the sale void, not only in a direct, but also in a collateral proceeding: *Merchants' Bank v. Evans*, 51 Mo., 335.

#### LAND DAMAGES.

1. In estimating the damages of a land-owner, for the taking of a strip of his land across his lot, for the location of a railroad, the award must be restricted to the direct injuries to the lot in question: *B. & P. R. R. Co., v. McComb*, 60 Me., 290.

2. Thus, a sheriff's jury may consider the value of the land taken; and if the remainder of the lot is rendered less valuable by reason of being severed, or disfig-

ured on account of the strip taken and the use made of it, they may allow such sum as they find the injury to be; and in determining the consequent depreciation of the lot, they may consider the use to which the strip taken is appropriated; the character, situation, present and probable use of the remainder of the lot; the distance of the owner's buildings from the location of the railroad; and any facts which the jury, from a view and testimony, shall find injure the value of the premises by a proper and legal use of the road: *Ib.*

3. So also they may consider all inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, and from smoke, so far as they severally arose from the use of the strip taken, and upon it, excluding all common and indirect damages: *Ib.*

4. So also, if they find that the real value of the remainder of the lot and of the erections thereon was actually diminished by exposure to fire from the company's locomotives they may assess such sum as will be a just compensation for such diminution, taking into consideration at the same time, that by the statute if property is injured by fire communicated by a locomotive engine, the company using it is absolutely responsible for such injury: *Ib.*

#### LANDLORD AND TENANT.

1. At common law, a covenant for quiet enjoyment is *implied* in every mutual contract for the leasing and demise of land, by whatever form of words made: *Eldred v. Leachy*, 31 Wis., 546.

2. For any unnecessary and wrongful molestation of the tenant by the landlord, impairing his use and enjoyment of the devised premises, the tenant may *counterclaim* damages in an action against him for rent: *Ib.*

3. If the tenant is prevented by such act of the landlord from occupying some part of the premises, he may *defend* in part, an action for the stipulated rent, on the ground of a partial failure of the consideration: *Ib.*

4. Where the landlord shows that he was required by a *valid* order and ordinance of the municipal authorities to perform the acts complained of by the tenant (in this case filling up the street and sidewalks adjoining the demised premises), *it seems* that this would be a sufficient answer to such a defense or counterclaim: *Ib.*

5. But where the legal power of the municipal authorities to make such order and ordinance depended on certain preliminary proceedings being had (such as the presentation of a certain petition), the landlord, setting up such order and ordinance, must prove the existence of such preliminary proceedings, and their existence will not be *presumed* upon proof of the making of the order and ordinance: *Ib.*

#### LEASE.

1. Where a railroad company leases its road and all its lands, upon or across which the road or any part thereof, or its machine shops, warehouses, freight or passenger depots, or buildings, are constructed, such lease includes all lands acquired for use in operating the road, and without which the use of the road or any part thereof will be less convenient and valuable: *In re N. Y. C. R. R.*, 49 New York, 416.

2. Where a lease for a term of years contains a clause giving the lessee the privilege of keeping and occupying the premises for such further time after the expiration of said term, as he shall choose or elect, yielding and paying therefor the same rent, and where before the expiration of the specified term the lessor dies, the lessee is not entitled to renewal or extension of the lease: *W. T. Co. v Lansing*, *Ib.*, 499.

3. The most that is created by the clause is a tenancy from year to year after the termination of the term, determinable at the pleasure of either the lessee or owner of the reversion, upon giving the requisite notice: *Ib.*

4. Where during the existence of a continuing co-partnership of undetermined duration, three of four co-partners, without the knowledge of the other, obtain a new lease in their own name of premises leased and used by the firm, the same becomes partnership property, and upon dissolution the other partner is entitled to his proportion of its value: *Struthers v. Pearce*, 51 N. Y., 357.

#### LEGISLATURE.

The Constitution of West Virginia requires each branch of the Legislature to keep a journal, and provides that on the passage of every bill the vote shall be taken by yeas and nays, and be entered on the journal, and no bill shall be passed by either branch without an affirmative vote of a majority of the members elected thereto; and on a question touching the validity of an act, this court can look beyond the authentication of the act, to the journal of either branch, to see if the bill passed by the required number of votes: *Osburn et al. v. Stealey et al.*, 5 W. Va., 85.

#### LIEN.

A lien on crops to be made on the landlord's land reserved by parol in favor of the landlord, to secure advances for supplies, is not valid: *Hughes v. Whitaker*, 4 Heiskell, 399.

#### LIFE INSURANCE.

An insurance by A. on the life of B., where A.'s claim on B. is simply the pretext for the insurance; where A. has no interest in the life of B., he would reasonably desire to have protected by insurance; or where A.'s interest is small, and the insurance vastly disproportionate, is a gaming contract, and therefore, can not be sustained: *Mowry v. Home Life Insurance Co.* 9 R. I., 346.

#### LIMITATION OF ACTIONS.

1. The requirement of section 110 of the Code, that an acknowledgment or new promise to take a case out of the operation of the statute of limitations must be in writing, does not alter the effect of a payment of principal or interest. Nor does it prescribe any new rule of evidence as to the fact of such payment, and it may be proved by oral admissions of the debtor. Such payment may be made by an agent, and the authority of the agent may be proved by parol evidence: *First National Bank v. Ballou*, 49 N. Y., 155.

2. The statute of limitations, by which an action for equitable relief is absolutely barred by lapse of time, does not effect the general doctrine of equity or the principles upon which relief is granted in particular cases, and although an action for specific performance be brought within the statutory limit as to time, the question still remains, and must be decided in each action, whether under peculiar circumstances, equity and good conscience require a specific performance or will leave the party to his remedy at law: *Peters v. Delaplaine*, *Ib.*, 362.

3. A right of action for specific performance accrues upon the refusal of the vendor to perform as required by the terms of the contract, and the fact that the vendor could not then give a perfect title, does not effect the cause of the action or the extent of the relief, but operates merely to modify the form of the decree substituting compensation or indemnity in part for a full specific performance. It is no answer, therefore, to a claim that the statute of limitations then commenced running, that the form of relief the vendee could then have had was not precisely the same as that subsequently attainable: *Ib.*

4. Payment of interest by one of several promissors on a note before the statute of limitations attaches, takes it out of the statute as to the others: *Foster v. Evans* 51 Mo., 31.

5. Adverse possession for ten years is not only a bar as a limitation, but constitutes an affirmative legal title: *Merchants' Bank v. Evans, Ib.*, 335.

#### LIMITATIONS STATUTE OF.

No verbal acknowledgment or promise on the part of a debtor can take the items of an account out of the operation of the statute of limitations: *Hager v. Springer*, 60 Me., 436.

#### LIS PENDENS.

The pendency of a prior suit duly prosecuted and not collusive against the same person to reach the same property, is constructive notice to the purchaser of the property under a later suit, and the *lis pendens* begins from the service of the *subpoena* after filing the bill: *Thorpe, Adm'r, v. Dunlap et al.*, 4 Heiskell, 674.

#### LORD'S DAY.

An action will not lie to recover damages arising from the immoderate driving of a horse during a pleasure drive on the Lord's Day, for which he was hired: *Parker v. Tatner*, 60 Me., 528.

#### MANDAMUS.

1. A judicial error can not be corrected by writ of mandamus. The writ lies to compel subordinate courts to proceed with and determine cases pending before them; to correct many errors of ministerial officers, and even those of courts when in the exercise of mere ministerial functions; but does not lie to compel a judicial tribunal to render any particular judgment, or to set aside a decision already made: *Weeden v. Town of Richmond*, 9 R. I., 128.

2. Hence, an application that a writ of mandamus might issue to the town council of the town of Richmond, commanding them to place the relator's name on the voting list of said town, or show cause why they should not do so, was refused, the action of a town council, sitting as a board of canvassers, under authority of chapter 24, section 15, of the Revised Statutes, being judicial in its nature: *Ib.*

3. Where, on an appeal from a judgment awarding a peremptory *mandamus*, it appears that the relator is *now* entitled to such writ, the judgment will be affirmed without regard to the question whether it was correct when rendered: *State ex rel, Voight v. Haeflinger*, 31 Wis., 257.

4. The writ of mandamus should expressly state the duty required of the defendant: *Hartshorn v. Ellsworth*, 60 Maine, 276.

5. A mandate requiring the defendant to assess a school district tax according to law, being a requirement to look beyond the writ, is erroneous: *Ib.*

6. When, on a petition for mandamus, by the terms of the exceptions, if the petitioners were not entitled to have the writ as prayed for, the petition was to be dismissed, and the prayer was that the defendant should assess said district tax according to law, to-wit: on the personal estate within the district of non-residents of the district; and the defendants could not lawfully assess such property unless such owners should occupy, as is provided in the first clause of R. S. C. 6, § 14, a mandate can not legally issue as prayed for: *Ib.*

#### MANSLAUGHTER.

1. The willful killing of an unborn child is not manslaughter, except as made so by statute: *Evans v. The People*, 49 New York, 86.

2. To constitute the crime of manslaughter, created by chapter 631 of the laws of 1869, in causing the death of an unborn child by an attempt to produce miscarriage, the quickening of the child in the mother's womb must be averred and proved. The child is not the subject of manslaughter under the statute until it has "quickened." *Ib.*

3. Under an indictment, therefore, charging the accused with causing the death of the child, there can be no conviction of an attempt to commit the offense without proof that the child was "quick" at the time of the commission of the wrongful act done, with intent to produce the miscarriage. (Grover, J., dissenting): *Ib.*

#### MARRIAGE SETTLEMENT.

A firm of co-partners being indebted to a woman by note, one of the partners married her, settling her estate on her by marriage settlement. She filed this bill to recover the money:

*Held*, that in equity it was a subsisting debt, and that she might recover of her husband and his partners: *Bennett v. Winfield*, 4 Heiskell, 440.

#### MARRIED WOMEN.

1. In an action brought by a married woman to recover damages for personal injuries caused by the wrongful act of another, unless she is carrying on a trade or business, or performing labor or service on her sole and separate account, she is not entitled to recover consequential damages resulting from her inability to labor. Her service and earnings belong to her husband, and for loss of such service he may have an action. This right is not affected by the act of 1862 (chapter 172, laws of 1862), amending the act concerning the rights and liabilities of husband and wife (chapter 90, laws of 1860): *Filer v. N. Y. C. R. R.*, 49 New York, 47

2. In an action upon a contract executed by a married woman it is not necessary to allege in the complaint that the contract was executed in her business, or for the benefit of her separate estate, nor is it necessary to ask judgment charging her separate estate, but the complaint may be framed as if defendant was a *feme sole*, and if coverture is interposed as a defense, testimony proving the contract to be enforceable against a *feme covert* is proper in reply: *Heir v. Staples*, 51 N. Y., 136.

#### MASTER AND SERVANT.

1. The duty of the master to the servant, and the implied contract between them, is to the effect that the master shall furnish proper, perfect and adequate machinery or other materials and appliances necessary for the proposed work, and also shall employ skillful and competent fellow-servants, or shall use due and reasonable care to that end. This duty or contract is to be affirmatively and positively fulfilled and performed. It is not enough that the master selects one or more general agents of approved skill and fitness, and confers upon them the power of selecting, purchasing or hiring. If the general agent carelessly places by the side of the servant another unskilled and incompetent, and damage results to the servant in consequence, the master is liable; and this is so, whether the incompetency or want of skill of the fellow-servant existed when he was hired, or has come upon him since, and he has been continued in service with notice or knowledge, or the means of knowledge, upon the part of the master, of the defect. It is the duty of the master to his servant to discharge from his service, upon notice thereof, any other servant who, from any cause, has ceased to be competent and skillful: *Daniny v. N. Y. C. R. R.*, 49 N. Y., 521.

2. Where the servant has full and equal knowledge with the master that the machinery or materials employed are defective, or that the fellow-servant is incom-

petent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not of itself, as matter of law, exonerate the master from liability, but the question of contributory negligence is one for the jury. (Allen, J., dissenting): *Ib.*

#### MORTGAGE.

1. The assignment of a mortgage, without assigning an interest in the debt it is given to secure, is an unmeaning ceremony: *Hubbard et al. v. Harrison et al.*, 38 Ind., 323.

2. A duly recorded chattel mortgage of a livery stock, describing the horses as eight horses, being the same now in Stable No. 19, Silver Street, is sufficient as against a subsequent purchaser of two of the horses, although at the time the mortgage was executed, for some time previous and subsequent thereto, many other horses not owned by the mortgagor were constantly boarded there: *Elder v. Miller*, 60 Maine, 118.

#### NATIONAL BANKS.

1. A power to regulate the transfer or manner of transferring stock is sufficient to authorize a by-law that stock shall be transferred only at the bank or on the books; and in that case, until such transfer, the purchaser could take only an equitable title, subject to any claims of the corporation by charter, or by-law, or valid usage or agreement: *Lockwood et al., Trustees, v. Mechanics' National Bank et al.*, 9 Rhode Island, 308.

2. A national bank has the power, under the National Currency Act of Congress of 1864, chapter 106, 1st session 38th Congress, to make by-laws providing that the shares of its capital stock shall be transferable only on its books, that no stockholder shall be allowed to sell or transfer his stock while indebted to the bank, without the assent of the directors; and that the stock of any stockholder shall be held pledged and liable for the payment of any debt due or owing from such stockholder, and may be sold at public auction for the satisfaction of such debt, on default of payment thereof: *Ib.*

#### NAVIGATION.

If by the want of proper lights upon a vessel, those in charge of another vessel are deceived and a collision happens, this is such contributory negligence as will prevent the owner of the former from recovering for the injuries resulting; but if those in charge of the latter knew the true state of the facts, and with reasonable care could have avoided the injury, the absence of proper lights is no defense: *Silliman v. Lewis*, 49 New York, 379.

#### NEGLIGENCE.

1. Where a passenger upon a railroad, by the wrongful act of the company, is put to an election between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised wantonly or unreasonably. It is a proper question for a jury, whether the adoption of the former alternative is ordinary care and prudence, or a rash and reckless exposure to peril. Under such circumstances, where the decision is required to be made upon the instant, the passenger will not be held to the most rigid accountability for the highest degree of caution: *Filen v. N. Y. C. R. R.*, 49 New York, 47.

2 Plaintiff attempted to get upon one of defendant's cars while slowly passing a

station where he had bought a ticket. The platform and steps of the car were full, so that he could only get upon the lower step. A jerk of the cars threw him off, but he held on to the iron rod and ran along by the car striving to recover his position upon the step, although the speed of the train was increasing, when he was struck by a platform near the track and injured:

*Held*, there was such contributory negligence upon his part as justified a nonsuit; and that the facts that some one upon the train called out the station, that others were also getting upon the train, and that plaintiff himself and others had got on and off at this station when trains were in motion, did not justify plaintiff's persistence in getting on the car when thrown from the step, without regarding objects near the track. (Church, Ch. J., dissenting): *Phillips v. R. and S. R. R.*, *Ib.*, 177.

3. The fact that a parent living upon a quiet street, where few vehicles pass, permits a child six years old to go unattended upon the streets, does not constitute negligence *per se*. It is a question proper for the jury: *Cosgrove v. Ogdon*, *Ib.*, 255.

4. When passengers are getting on or off a train, suddenly to put it in motion so as to endanger their safety, without giving any signal, is an act of negligence: *Keating v. N. Y. C. R. R.*, *Ib.*, 673.

5. The degree of care which a person owing diligence must exercise depends upon the hazards and dangers he may expect to encounter and the consequences which may be expected to flow from his negligence. Such care only is required as a man of ordinary prudence and capacity may be expected to exercise in the same circumstances: *Unger v. Forty Second St. and G. St. F. R. R. Co.*, 51 N. Y., 497.

6. The same degree of care is not required of the carriers of passengers upon street cars drawn by horses as of railroad companies whose cars are drawn by steam. No greater degree of care as to pedestrians in a street is required of a street railway company running the cars therein than is required of the driver or owner of any other vehicle: *Ib.*

7. In the attachment of horses to its cars it is not bound to use the best method human skill and ingenuity have devised to prevent accidents. If it uses the method in general use, and which has been found usually adequate and safe, its duty in this respect is discharged: *Ib.*

8. The ringing of a bell or the sounding of a whistle upon a locomotive attached to a long freight train, which is standing with its rear end partially across a street in a city, is not such notice to passengers upon the street of an intended backward movement of the train as will absolve the railroad company from the charge of negligence. Nor does the omission of those signals absolve the passengers upon the street from the obligation to exercise proper care and watchfulness: *Eaton v. E. R. R. Co.*, 51 N. Y. 544.

#### NEGOTIABLE PAPER.

A pledgee of negotiable paper has generally a right to collect the whole amount of securities pledged to him, and account to the pledgor for the surplus over his debt. But in case of accommodation paper pledged, the pledgee can recover of the maker only the amount of the debt due him from the pledgor: *Atlas Bank v. Doyle*, 9 Rhode Island, 76.

#### NEW TRIAL.

1. If a motion for a new trial, for error in the trial of a cause, is entered and continued without a bill of exceptions, to a term subsequent to the trial, and comes on before a judge other than the one before whom it was tried, the motion will be overruled. *Williamson v. Anthony*, 4 Heiskell, 78.

2. Parol proof is not admissible to show the action of the judge or the proceedings on the trial, for the information of another judge presiding at a subsequent term: *Ib.*

3. Subject to the rules of evidence and certain general principles, the whole conduct of a trial, the order of introducing evidence, and the allowing a party to introducing evidence at a particular time, is subject to the discretion of the presiding judge, and it is no ground for a new trial, that where the plaintiff, in an action on a policy of life insurance upon another's life, closed his testimony without offering any evidence showing that he had an insurable interest in the life of the party insured, the presiding judge having at first decided to sustain a motion for nonsuit on the part of the defendant, afterwards allowed the plaintiff to offer evidence of his insurable interest: *Mowry v. Home Life Insurance Co.*, 9 Rhode Island, 346.

4. The admission of irrelevant testimony, which would be likely to prejudice the jury against one of the parties to a suit, and may have injuriously affected him in the trial of the cause, is a sufficient ground for granting a new trial: *Graham v. Coupe*, *Ib.*, 478.

#### NON SUIT.

The dismissal of a cause is equivalent to a *nol. pros.*, or non suit, and may be set aside by the description of a *non suit* at the same term at which it is entered: *Rogers v. Yates*, 4 Heiskell, 257.

#### NOTARIES.

A notarial certificate, founded upon a presentment and demand made not by the notary, but by his clerk, is void: *Gawtry v. Doane*, 51 N. Y., 84.

#### NUISANCE.

An unauthorized excavation in a street of a city for the benefit of adjoining premises is a nuisance, and all persons who continue or in any way become responsible for it are liable to any person who is injured thereby, irrespective of any question of negligence: *Irvine v. Wood*, 51 N. Y., 224.

#### PARTITION.

1. A report of commissioners appointed to make partition of an estate, need not necessarily be unanimous to render it valid. It is sufficient if it appears to be the report of a majority of the commissioners. But it is indispensable that they all be present to hear and deliberate, and that the report show affirmatively that all were present: *Townsend v. Hazard et al.*, 9 Rhode Island, 436.

2. The fact that two of three commissioners appointed to make partition, viewed the premises to be divided, unaccompanied by the third, and at different times conferred together without notice to him:

*Held*, not to invalidate their proceedings in making partition, when such a view and conference were made with no improper motive, and all the commissioners were present at the hearing, and conferred before and when the report was finally agreed upon: *Ib.*

3. Commissioners appointed to make partition are not entitled to amend their report once made, without leave. *Hence*, where leave was granted to such commissioners to amend, in vacation, without the consent of the parties, and without notice to them, it was

*Held*, to be error on the part of the court to grant such leave, and

*Held, further*, that a judge who had taken no part in previous hearings could not confirm such leave to amend by an order granted in term-time, nor enter judgment without hearing the same as long as anything remained opened for hearing: *Ib.*

4. The fact that defendant has not objected *by his answer* to the jurisdiction of equity, is not to be treated as a waiver in a case of controverted legal title; *Taney v. The State Bank* (20 Wis., 152), and *Peck v. School District* (21 Wis., 522), distinguished from this case: *Deery v. McClintock et al.*, 31 Wis., 195.

#### PARTNERS.

A member of a partnership, who personally or by clerk, and with or without authority from the firm, signs the firm name to a promissory note as surety thereon, is responsible upon the note, in the same manner and to the same extent as if he had signed his own individual name thereto: *Silvers v. Foster*, 9 Kan., 56.

#### PARTNERSHIP.

1. By the late civil war all commercial partnership between citizens of the Northern and of the Southern or Confederate States were dissolved. A citizen, therefore, of the State of New York, a former member of such partnership, doing business in New Orleans, is not liable upon a note indorsed in the firm name after the commencement of the war. In an action upon a note thus indorsed, the fact that in a power of attorney given to an agent of the firm, executed by such citizen, he is described as of New Orleans, does not estop him from alleging a residence in New York, in the absence of proof that the party discounting the note had seen the power of attorney or believed he resided in New Orleans: *Bank of New Orleans v. Matthews*, 49 New York, 12.

2. Where real estate is deeded to the members of a co-partnership as individuals, the legal effect of the conveyance is to make them tenants in common; but if the co-partnership funds have been expended in the purchase, and the land purchased and used for co-partnership purposes by agreement to that end, it is to be treated in equity as co-partnership assets. So also, where moneys of the firm have been expended in improvements upon real estate so deeded, the same effect follows as to its enhanced value. The creditors of the co-partnership are entitled to a priority of payment therefrom, and the creditors of an individual member of the co-partnership are to be preferred to those of another member, and one member to another or to his creditors, for any amount paid in by one, in excess of the share he was bound to contribute, or in excess of his proportion of the debts of the concern: *Hiscock v. Philips*, *Ib.*, 97.

3. Where a mortgage is given by one member of a co-partnership to secure an individual debt upon his apparent interest as tenant in common in real estate thus purchased and used for co-partnership purposes to a *bona fide* mortgagee without notice of the facts, the latter can repose upon the legal effect of the conveyance, and is entitled to a priority of lien; but if the mortgage is given for a precedent debt, and the mortgagee parts with no valuable thing in reliance upon its security, or if he has knowledge of the facts, he takes his mortgage with notice of the character equity has impressed upon the property, and subject to the equities superior to his own of any and all persons interested in the property: *Ib.*

4. Where a sheriff receives for collection an execution against one of the members of a co-partnership, and by virtue thereof levies upon the interest of the judgment debtor in the goods of the firm, and where, within sixty days after receipt,

and before a sale, he receives an execution against all the members of the firm for a co-partnership debt, the latter is the prior lien, and if upon sale the stock proves insufficient to satisfy it, he is justified in returning the former execution *nulla bona*: *Eighth National Bank v. Fitch, Ib.*, 539.

5. S. M. & P. advertised themselves as co-partners under the firm name of J. E. S. & Co. S. in fact owned the entire interest in the property nominally of the firm, and in the profits of the business. S. failed and went into bankruptcy. In a contest between attaching creditors of the firm and the assignees in bankruptcy:

*Held*, that while, as matter of law, M. and P. having none of the rights of partners, could transmit none to creditors, and the property being the individual property of S., passed to his assignees; yet, that inasmuch as the creditors of the firm, who dealt with it in ignorance of the real state of facts, had a right to rely, and were presumed to have relied, not only upon the personal responsibility of the nominal partners, but upon the equitable lien upon the property resulting from that relationship, both R. and his assignees were estopped from denying that M. & P. were actual co-partners; that the firm creditors were entitled to all the rights which they would have had if such had been the fact, and therefore to a preference in the payment of their debts out of the assets nominally of the firm: *Kelly v. Scott, Ib.*, 595.

6. The indorsement by a partner in the name of the firm, of paper not belonging to the firm, which is in effect lending or giving the credit of the firm, carries with it the presumption that the partner making it was not authorized so to do: *Thompson v. Woodyard*, 5 West Virginia, 216.

7. A third party taking from a partner the signature of his firm upon his own private, individual transaction, can not hold the firm without proof of authority, adoption or ratification of the act. And the taker of a note under such circumstances must prove the assent of the other partners, for *prima facie* such a transaction is a fraud both on the part of the debtor and creditor: *Ib.*

8. A special partner, who makes such representations to any parties as to his interest in his firm, his responsibility and his share of the profits, as to lead them to suppose he is personally liable as a general partner, and to induce them thereby to sell goods to the firm, will be held liable as a general partner for all purchases so made of said parties after the date of those representations: *Barrows v. Downs & Co.*; *Meriden Britannia Co. v. Same*, 9 Rhode Island, 446.

#### PAWN OR PLEDGE.

A sale of goods, with delivery of possession, and without reservation of the title to the seller, with an understanding that a third person, (who is to receive a part of the purchase money) should have joint possession with the vendee until paid, but without any title conveyed to him, or control reserved to him, can not have effect against creditors as a pledge or lien, to secure such portion of the purchase money: *Smith v. Atkinson*, 4 Heiskell, 625.

#### PLEADING.

1. Where pleadings in short are put in as "replication and issue," they will be treated as covering any defense made by the evidence: *Barbee v. Williams*, 4 Heiskell, 522.

2. Under a general demurrer no advantage can be taken of purely formal defects in pleadings: *Neal v. Hanson*, 60 Me., 84.

3. Thus, in trover for a promissory note signed by the plaintiff and made payable by its terms to the defendant, the objection that the declaration does not allege

that the plaintiff was possessed of the note as of his own proper goods and chattels, or that it does not allege the value of the note, being purely formal can not be taken advantage of by general demurrer: *Ib.*

4. When the replication of a plea of performance of the conditions of a bond for the performance of covenants and agreements, set forth the precise amount of money received by the principal and unaccounted for, and is adjudged good on special demurrer, the sum named is a fact admitted by the demurrer, and judgment must go for that amount: *State v. Peck, Ib., 498.*

#### PLEADING AND PRACTICE.

1. The Supreme Court will not give an opinion for the guidance of parties, or of an inferior tribunal, in a case not properly before them, over which they have no jurisdiction, although it is desired by all parties to the cause: *Weeden v. Town Council of Richmond, 9 R. I., 128.*

2. The court will presume, after verdict rendered, that every thing was found by the jury which was necessary to support the verdict, even if not alleged in the pleadings of the party in whose favor the verdict has been found: *Irons and wife v. Field and wife, Ib., 216.*

3. The waiver of a jury trial in a special court case, and submission of the case under the statute, in law and fact, to the Judge holding the Court, deprives the party aggrieved by his decision of the right to review the same in matters of fact before the Supreme Court; and where the party aggrieved contends that the Judge erred in determining the legal effect of certain facts given in evidence, all the facts adduced in evidence before him must be laid before the Supreme Court, by agreed statement of facts or otherwise, before they can review his decision: *Mitchell v. Wilson et al., Ib., 343.*

4. A party failing to except on demurrer overruled and answering over, can not afterwards raise the points involved in the demurrer, before the Supreme Court: *Higley v. Noel, 51 Mo., 145.*

#### PLEDGE.

Plaintiff was the owner of fifty shares of New York Central stock she delivered the certificate therefor, assigned in blank, to P., to be used by him as security in stock transactions. P. transferred the certificate to defendant as security to cover any balance upon his dealings in stock with and through them, notifying them that the plaintiff was the owner. One S. acted as broker for P. in the purchase and sale of stocks, having written authority to act on P.'s behalf in any stock transactions with defendant. Subsequently, by direction of S., defendant sold the stock in question. In an action for the conversion thereof:

*Held*, (Grover, J., dissenting,) that the power to S. did not include any authority to sell this stock or to interfere with the contract between the principals. That defendant having notice, P. could confer no power of sale upon them, save as pledges, in the manner and upon the notice required by law, and having sold without such notice they were liable: *Porter v. Parks, 49 N. Y., 564.*

#### PRACTICE.

A person claiming title paramount to that of the husband, may become a party to a proceeding for dower on his petition: *Hill v. Bowers, 4 Heiskell 272.*

#### PRACTICE IN SUPREME COURT.

1. ~~Where an~~ issue of fact is by consent submitted to a Circuit Judge without a

jury, on appeal to the Supreme Court, the cause will not be remanded, if reversed, but that Court will pronounce the judgment the Circuit Court ought to have entered: *Boothe v. Allen*, 4 Heiskell, 258.

2. If a cause be set down as unlitigated in the Supreme Court, and it appears clearly to be a case for reversal, it will be reversed, instead of being remanded to the trial docket: *Cummings v. Wallace, Ib.*, 102.

#### PRESUMPTION.

Where there is a long series of uniform decisions, asserting the same principle and reaching the same conclusion upon like facts, the fact that a point involved therein has not been in all cases raised by counsel or started by the court, is strong support to the conclusion that the point has no foundation: *Webb v. R. W. & O. R. R.*, 49 N. Y., 420.

#### PRINCIPAL AND AGENT.

1. The contract of a surety is the measure and limit of his liability. Upon the death of one of the makers of a joint promissory note, who was not liable for the debt, irrespective of the joint obligation, but who signed the note simply as surety, his estate is absolutely discharged both in law and equity, and the survivors only are liable: *Getty v. Binsse*, 49 N. Y., 285.

2. Defendant's vessel being ashore at the Delaware breakwater, he telegraphed to M. & D., in New York, as follows "Send me a small tow-boat. \* \* \* Make the best bargain you can:"

*Held*, (Allen, J., Grover and Folger, JJ., concurring,) that the authority contemplated the hiring of a boat already manned and equipped, and in the absence of proof of a necessity for such action, or of proof of the existence of a custom or usage to that effect, the agents were not authorized to assume on behalf of defendant the perils of the service or the risks of the voyage, or to insure against the negligence of any one employed in the navigation or handling of the boat: *Martin v. Farnsworth, Ib.*, 555.

3. Where property is sold to the special agent of an undisclosed principal, on the credit of the agent, the principal, in a suit against him by the seller to recover the price, may show payment in full to the agent as a defense: *Thomas v. Atkinson*, 38 Ind., 248.

4. Notice to an agent of a corporation relating to any matter of which he has the management and control, is notice to the corporation: *The P., Ft. W. & C. R. R. Co., v. Ruby, Ib.*, 294.

#### PROMISSORY NOTE.

1. A notice to an indorser merely informing him of the non-payment of the note and demanding payment of him, without stating in substance that payment has been demanded of the maker, or giving any legal excuse for not demanding it of him, is insufficient to charge the indorser: *Puge v. Gilbert*, 60 Me., 485.

2. A statement in the official certificate of the notary that he delivered notice of the non-payment of said note to the indorser, naming him, demanding payment of him, is insufficient to charge the indorser: *Ib.*

3. A note payable in nine months, or as A.'s horse earns the money, is absolutely payable in nine months, but sooner if the money was earned sooner: *Gardner v. Barger*, 4 Heiskell, 668.

#### PUBLIC LANDS OF UNITED STATES.

There can be no adverse possession of lands belonging to the government; and

where plaintiff in ejectment claims under a grant from the United States the occupation of the land by defendant, under claim of exclusive right, for any number of years before the government parted with either the legal or equitable title, is no bar to a recovery: *Whitney et al. v. Gunderson*, 31 Wis., 359.

#### QUO WARRANTO.

A pledgor of stock, which stands on the books of a corporation in the name of the pledgee, may, by suit in equity, compel a transfer to him, or oblige the pledgee to give him a proxy to vote; but where the pledgor acquiesces for years in the control of the stock by the record owner, the pledgee, and makes no attempt to inform the corporation of his ownership until a contested election occurs, and then not until the votes are being or have been counted, it is too late to ask the interference of a court of equity with the declared result of such election: *Hoppin et al. v. Buffum et al.*, 9 R. I., 513.

#### RAILROAD CORPORATIONS.

The wife of plaintiff was a passenger upon defendant's road from New York to Mt. Vernon. Immediately upon the arrival of the train the baggage-master placed her trunk in the depot and went away. She waited fifteen minutes to get the trunk, but could find no one to deliver it. About three hours after, plaintiff's son went to the depot for it, but the baggage-master was still absent. The son went in pursuit of him, and returning with him, delivered his check and the trunk was drawn out to the door, but, meanwhile, the conveyance employed to remove the trunk had gone, and no other could be obtained, and it was thereupon left in charge of the baggage-master for the night. During the night it was broken open and rifled of its contents. In an action to recover for the loss:

*Held* (Allen and Folger, JJ., dissenting), that defendant's liability as common carrier had not terminated and that it was liable: *Dinniny v. N. Y., and N. H. R. R.*, 49 N. Y., 546.

#### RAILROADS.

1. *Railway Companies as Common Carriers of Goods.* *Per CURIAM*: Ordinarily, when goods are shipped to be transported by several successive and connecting lines, they are to be considered *in transit* until they reach their final destination, and the peculiar liability of a common carrier exists *continuously*, although, for the convenience of the successive carriers, the goods may be temporarily deposited in depots or warehouses on the route, and the carrier in whose possession they are when destroyed or injured, is liable, as such, to the owner or consignee for the loss. *Wood v. M. & St. P. R. Co.*, 27 Wis., 54, as to the above points overruled: *Concey v. M. & St. P. R. Co.*, 31 Wis., 619.

2. *Per DIXON, C. J., arguendo*: If goods are lost while waiting at the end of one carrier's line for delivery to the next carrier, such first carrier, after responding in damages to the owner or consignee, must seek his remedy against the next carrier if the loss occurred through his neglect to remove the goods within due time according to the course of business and the usage among carriers: *Ib.*

3. In case of an extraordinary interruption of communication along the line of transit (as by storm, flood, earthquake or war), necessitating a considerable delay in transportation, the carrier in whose hands the goods are, may store them, and at once give notice to the consignee, and thus absolve himself from liability as carrier, while such interruption continues: *Ib.*

4. In proceedings for the condemnation of land for railroad purposes, the recep-

tion by the owner of the land, of the money allowed by the commissioners on the condemnation, is not a waiver of a trespass committed by the unauthorized entry and occupancy by the agents of the road before the condemnation of the land had been perfected: *Powers v. Hurmert*, 51 Mo., 136.

#### RAILROAD STOCK.

1. The defendant, with numerous others, signed a subscription of the following tenor: We, the undersigned, agree and bind ourselves to take the amount of shares set against our respective names, in the stock of the Belfast and Moosehead Lake Railway Company, agreeably to the foregoing conditions:

*Held*, that the simple agreement to take imposed no personal obligation to pay for the shares: *Belfast & M. L. R. R. Co. v. Moore*, 60 Maine, 561.

2. Also held, that the conditions, which contained no words of promise, did not change the force of such agreement in this particular: *Ib.*

3. And the construction of such an agreement is not affected by a provision in the charter purporting to render the subscriber liable for the balance remaining due after a sale of his shares: *Ib.*

#### RECEIVER.

A purchase by a receiver, as agent of another, of property sold at his own sale, made under order of court, is voidable at the election of a party having a beneficial interest in the property, and when such election is promptly made, the sale will be set aside: *Curr, ex'r, et al. v. Houser, adm'r*, 46 Georgia, 477.

#### RECOGNIZANCE.

A justice of the peace must have an office, where parties, witnesses, and sureties must appear; and on changing his office, notice should be given to persons who have been required to appear at his former office; and where this was not done, a forfeiture declared for failure of the parties to appear at his new location, they having appeared at his former office at the proper time, was held void: *Hannum et al. v. The State*, 38 Indiana, 32.

#### RECOUPMENT.

A promissory note, and an agreement which is the consideration for the note, are not such independent contracts that the breach of the one can not be set up by way of recoupment to the other: *Hill v. Routhwick*, 9 Rhode Island, 299.

#### REDEMPTION.

If the maker of a deed of trust becomes bankrupt before the sale under the deed, the right of redemption passes to the assignee and the debtor, and consequently the creditors lose the right. But this does not prevent the purchaser from advancing his bid: *Toombs v. Palmer*, 4 Heiskell, 321.

#### RE-HEARING.

Counsel should only ask for a re-hearing in the Supreme Court in cases where they can clearly show some oversight or omission, or bring to the notice of the court some new matter, really important, which was not before considered: *Andrews v. Crenshaw*, 4 Heiskell, 151.

#### REMOVAL OF CAUSES.

1. The right to remove an action from a State Court into the Circuit Court of the United States, under the provisions of the act of Congress of 1863, "relating to *habeas corpus*, and regulating judicial proceedings in certain cases" (12 U. S. stat. at

large, ch. 81, page 756), as amended by the act of 1866 (14 U. S. stat. at large, ch. 80, page 46), does not depend upon any act or assent of the State Court. If the case is within the provisions of that act, and defendant has regularly taken the steps required by it for the purpose of removal, all proceedings in the State Court are stayed absolutely; it has no further jurisdiction of the action; and any subsequent steps therein would be *coram non judice* and void. It can not be compelled, therefore, to grant any order staying proceedings; and such an order would add nothing to the force and effect of the act and the proceedings for removal. The question of jurisdiction must be decided by the Circuit Court. If the plaintiff persists in proceeding in the State Court, the defendant should appeal to the Federal Court for the proper mandate staying proceedings, and to compel a transcript of the record to be certified to that court; and if plaintiff claims that the cause has not, for any reason, been removed, he may apply to that court to remand the cause, (Allen J., Church, Ch. J., and Rapallo, J., concurring, Grover and Peckham, JJ., dissenting): *Bell v. Dix*, 49 New York, 232.

2. Under the act of 1789, it has been decided that the citizenship of all the plaintiffs taken together, and of all the defendants taken together, must be such as to make the case removable, and that all the defendants must unite: *Hazard v. Durant et al.*, 9 Rhode Island, 602.

3. It has been also held, under that act, that only those suits can be removed which could originally be brought in the United States Courts. The same language upon which Judge Story based that decision is used in all subsequent acts: *Ib.*

4. The bonds which the act of Congress of 1789, providing for the removal of suits from the State to the Federal Courts, requires should be given to the State Court by the defendants at the time of entering their appearance, to ensure their appearing and giving bail in the United States Court, must be several, or joint or several, and not joint bonds. The provision as to surety is nearly the same in other acts: *Ib.*

#### REPLEVIN.

1. Replevin can not be prosecuted in *forma pauperis*. But if bond be given for double the value of the property, and the costs accumulate to a large amount, on a rule for further security, the plaintiff may take the pauper's oath: *Horton v. Vowel*, 4 Heiskell, 622.

2. Where an officer, under a general promise of indemnity from an execution plaintiff, but without directions to levy upon specific property, has taken chattels in execution under a void judgment, the execution plaintiff, not having had such goods in his actual possession or control, is not liable, either separately or jointly with the officer, in replevin: *Grace v. Mitchell*, 31 Wis., 533.

#### RES JUDICATA.

Where a suit in equity was brought by the assignee of a note against the maker, a vendee of land, to enforce the vendor's lien, and the vendor, was made a party defendant, and on the demurrer of the other defendants, the bill was dismissed because the remedy was barred by the statute of limitations, it was held no bar to a subsequent suit in ejectment by the vendor to recover the land: *Gudger v. Barnes*, 4 Heiskell, 570.

#### REVIVOR.

While a suit pending by a creditor to set aside a conveyance as fraudulent as to creditors, the maker of the conveyance dying before judgment for the debt, and no administrator having been appointed, but the suit being revived against his heirs, it was held proper: *McCutchen v. Pigue*, 4 Heiskell, 565.

## REWARD.

To entitle a person to a reward offered for the recovery, or for information leading to the recovery of property lost, he must show a rendition of the services required after a knowledge of and with a view of obtaining the offered reward. The finding of the property and advertisement thereof, without knowledge of the offer, or the giving of information as to the whereabouts of the property, which information does not, in fact, lead to its recovery, does not entitle him to the reward: *Howland v. Lounds*, 51 N. Y., 604.

## SALES.

1. Defendants bought of Bond his cotton crop of 1861, and was to take it at the gin of Bond as it was ginned, and pay for it as it was ready; the ginning and baling to be done by Bond, the weights to be ascertained at the gin. Fifty-two bales, more than half the crop, which was ready when the contract was made, were received by defendant at the gin—the purchaser urging and directing the operation of the gin, and claiming the cotton. It was ginned, baled and weighed by Bond's agents, and lay at the gin for a month, the purchaser not taking it away, when it was seized by the Federal forces:

*Held* to be at the risk of the purchaser: *Bond v. Greenwald*, 4 Heiskell, 453.

2. A contract to sell two bales of cotton, to be ginned and baled—one at eighty cents in Tennessee currency, the other at sixty cents in greenbacks, is an entire contract, not severable at the option of the buyer: *Barker v. Reagan*, *Ib.*, 590.

3. A refusal by the seller to allow the buyer on payment for one bale to take it away unless he pay for the other, is no breach of the contract, and a subsequent resale of both bales, at a loss, made by the seller to pay his purchase money, will be at the buyer's loss: *Ib.*

4. On an executory contract of sale, the measure of damages, if the seller fails to deliver the article contracted for, and the price has risen, is the difference between the contract price and the value of the article at the time and place of delivery: *Coffman v. Williams*, *Ib.*, 233.

5. Inadequacy of price to set aside a sale must be such as to constitute evidence of fraud: *Merriman v. Lacefield*, *Ib.*, 209.

6. On a sale of land by a trustee, under trust to pay debts, without deed made, by the trustee to the purchaser, and on a sub-sale by the purchaser to a third person, the trustee having died, leaving minor heirs:

*Held*, that the sale was voidable, and by the death of the trustee, leaving minor heirs, it was incapable of confirmation: *Planters' Bank of Tenn., v. Vandyck*, *Ib.*, 617.

7. The plaintiffs, merchants in Boston, through a broker, on July 5th, sold for cash a lot of flour which they shipped to the vendees in Portland two days after, and on the 8th July forwarded a bill with terms cash printed thereon. On the 10th July, one of the plaintiffs went to Portland, and ascertaining the vendees had failed, and that the flour had been attached, replevied from the attaching officer:

*Held*, that by the *lex loci* the sale was upon the condition of payment on cash upon delivery, and that the action was maintainable without previous demand: *Stone v. Perry*, 60 Maine, 48.

8. A husband having purchased some neat stock with money lent him by his wife for the purpose, and put it upon a farm carried on by him, and on which she resided with him, thereupon for the purpose of repaying her for the money, conveyed to her the stock by an absolute bill of sale which he delivered to her, and which she ever after retained. No other delivery of the stock was made; and it remained and was

used on the farm as before. Three months thereafter, the defendant, as an officer, attached some of the stock on a writ against the husband. In replevin by the wife:

*Held*, that there was no sufficient delivery of the stock from the husband to the wife: *McKee v. Garcelon, Ib.*, 165.

9. Also held that notice of the sale to the officer holding the writ, before service, uncommunicated to the attaching creditor, is not notice to the latter: *Ib.*

10. The sale by the master of such parts of a vessel as belongs to part owners who were not, but might have been, notified by telegraph in season to act in the premises before the sale, is void: *Miller v. Thompson, Ib.*, 322.

#### SCIRE FACIAS.

1. If an alleged trustee does not disclose in the original action, he is liable to costs on *scire facias*, although the attachment is dissolved before judgment is recovered in the original action: *Bowker v. Hill*, 60 Maine, 172.

2. The *bona fide* assignee of a chose in action will, in general, be protected against the release of the nominal plaintiff, executed after notice to the defendant of the assignment; but where the payee of a negotiable promissory note fraudulently indorsed it before maturity, and without value to the plaintiff, for the purpose of excluding any inquiry into the fraudulent inception or want of consideration of the note, and by fraudulent assertions and devices concealed the true relations of the parties, in an action of *scire facias* to obtain an alias execution upon the judgment recovered upon such note in favor of the indorsee against the maker:

*Held*, that the court would not set aside a release from the judgment creditor to the defendant, but let it have its legitimate effect: *Atkinson v. Reynolds, Ib.*, 440.

#### SEPARATE ESTATE.

1. A deed securing property to a husband in trust for a wife for her sole and separate use, with the declared intent to continue her in reference to said property *a feme sole*, to all legal intents and purposes, with an express reservation of power to the wife to dispose of the same by last will or deed of gift, \* \* \* her right to dispose of the same as aforesaid in any way which she may choose, in no event to be impaired or restricted:

*Held*, not to confer a right to mortgage the land for the debt of the husband and wife: *Head v. Temple*, 4 Heiskell, 34.

2. It seems that a wife's separate estate may be charged with expenditures for the benefit of the estate. But a wife having a separate estate in lands in Tennessee, and also in Mississippi, the court refused to charge the Tennessee lands with expenditures for the benefit of the Mississippi estate: *Shucklett v. Polk, Ib.*, 104.

3. A conveyance to a married woman "*to her sole aid and behoof*," is to her separate use: *Gray v. Robb, Ib.*, 74.

4. A married woman can not convey her separate estate by statutory deed without privy examination: *Ib.*

#### SET-OFF.

In an action by executors against a bank to recover a sum of money on deposit in said bank, which stood to the credit of their testate at the time of his decease, but was subsequently transferred by said bank to the credit of said executors, the bank can not be allowed to set-off a debt due to itself from said testate, it having no lien on said deposit: *Tobey et al., executors, v. Manufacturers' National Bank*, 9 Rhode Island, 236.

## SHERIFF.

1. A sheriff who collects money without execution, or on an execution *functus officio*, is not liable to a proceeding against him and his sureties on his official bond: *Turner v. Collier*, 4 Heiskell, 89.

2. A sheriff is not entitled to demand a bond of indemnity before levying an attachment on disputed property: *Shaw v. Holmes*, *Ib.*, 692.

3. If a sheriff release property levied on, in obedience to an attachment, on information of an adverse claim, and return *nulla bona*, because plaintiff does not indemnify him, he and his securities are liable to an action for false return: *Ib.*

## STATUTE OF FRAUDS.

1. One who enters upon the lands of another and puts in crops under a parol license and a parol agreement that he shall have the crops raised by him, is entitled to the crops, and in case he is expelled from the land and the crops are converted by the owner or his agent, can maintain an action for conversion. (Grover, J., dissenting): *Harris v. Frink*, 49 New York, 24.

2. Where, under a parol contract for the sale of land, the vendee, with the consent of the vendor, in pursuance of the terms of the contract, enters into possession and puts in crops, the invalidity of the contract to sell and convey does not affect the vendee's title to the crops, and if the vendor refuses to perform and ejects the vendee, the title of the latter to the crops is not thereby divested. In such case the crops, as between the parties, are not a part of the realty, but chattels. (Grover, J., dissenting): *Ib.*

3. Where a vendee, under a parol contract of purchase, enters upon land with the permission of the vendor, and under an agreement that he may occupy and work it until the vendor is prepared to convey, he is a tenant at will, and as such, is entitled to the emblements, unless he has made default in his contract or committed waste, or in some manner terminated the tenancy by his own wrongful act. (Allen and Grover, JJ., dissenting): *Ib.*

## STATUTE OF LIMITATIONS.

1. Where, in a suit upon a promissory note, the defendant answered that at the time of the execution of the note he was, and ever since had been, a resident of the State of California, and that a law of that State limits the bringing of such actions to four years, a reply that the plaintiff was a resident of the State of Indiana when the note was executed to him, and that payment was to be made here, was held insufficient: *VanDorn v. Bodley*, 38 Indiana, 402.

2. Suit commenced in 1867, by the payee against the maker, on a promissory note dated in 1851. The answer was a statute of California limiting such actions to four years, and alleged that the defendant had resided in that State for more than that time before suit, and still resided there. Reply that both plaintiff and defendant resided in this State when the note was made; that defendant had removed from the State in 1852, and was still a non-resident; and that proceedings were commenced by attaching his interest in lands within the county where suit was brought:

*Held*, on demurrer, that the reply was insufficient: *Harris v. Harris*, *Ib.*, 423.

## STOCK BROKER.

Where a stock broker, without authority, transfers to himself stock of a customer in his hands for sale, in case the stock is subsequently sold at an advance, the customer can charge him with any profits realized from the transaction, or can treat him as having converted the stock to his own use, and charge him with damages for the

conversion; but the customer can not charge him with the price or value of the stock, either as purchaser or as having converted it, and at the same time claim the stock is undisposed of, and the account, for that reason, not closed: *Tansig v. Hart*, 49 New York, 301.

#### SURETY.

1. A stipulation of a creditor for delay with a principal debtor, after judgment, will not release a surety: *Bryant v. Rudisell*, 4 Heiskell, 656.

2. A surety is not entitled in equity to stay the proceedings on an execution against himself until the property of the principal is exhausted: *Ib.*

#### TAX.

A statute which exempts persons or property from taxation is to be strictly construed: *Trustees M. E. Church v. Ellis et al.*, 38 Ind., 3.

#### TELEGRAPH.

1. The defendant company transmitted messages during the night, known as night messages, at about one-half of the usual rates charged for day messages. And the plaintiff having received a telegram offering them a cargo of corn at ninety cents per bushel, went to the defendant's office, and calling for one of their night message blanks, on which was printed, it is agreed between the sender of the following message and this company that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message beyond the amount received by said company for sending the same; send the following message subject to the above terms which are agreed to; replied by writing thereon a message, properly addressed, of the following tenor: "Ship cargo named at ninety, if you can secure freight at ten—wire us the result:" and paid forty-eight cents, the rate for night messages. The message was sent, but not delivered, by reason whereof the plaintiff failed to obtain the corn at the terms offered, and the price of corn and freight immediately advanced. The defendant, admitted their liability to the extent of the sum paid:

*Held*, that the terms of the foregoing condition are not reasonable, and do not exonerate the company from liability beyond the sum paid for the transmission of the message. Appleton, C. J., dissenting: *True v. Int. Tel. Co.*, 60 Me., 9.

2. *Held*, also, that the rule of damages in such case is the difference between the price named, and that which the plaintiff would have been obliged to pay at the same place, in order by due diligence, after notice of failure of the telegram, to purchase the like quantity and quality of corn, with the same rule in relation to freight: *Ib.*

#### TITLE.

Where stock is transferred partly in payment of a precedent debt and partly for a consideration paid at the time, the purchaser will not be regarded as a holder for value as against one having the legal title or a prior equity, so far as the assignment was received in payment of the precedent debt (Grover, J., dissenting), but is entitled to a lien for the amount of the consideration paid, and to a re-payment of that amount, before he will be required to re-convey the stock: *Weaver v. Barden*, 49 New York, 284.

#### TOWNS.

By authority of law, in 1853, the town of Depere, to aid in the construction of certain roads, issued its bonds, payable in twenty years, with interest payable annu-

ally. Subsequently, by resolution of the county board, certain parts of the territory and inhabitants previously included in said town, were organized into the defendant towns, the remaining territory and inhabitants still constituting the town of Depere. In an action to enforce contribution from the defendant towns of their proportionate share of sums paid by the town of Depere as interest on said bonds, no provision appearing to have been made in the organization of the defendant towns for the payment of any of said indebtedness of them:

*Held*, that they were not liable: *Town of Depere v. Town of Bellevue*, 31 Wisconsin, 120.

#### TRADE-MARK.

*It seems* that it is not necessary that the claimant of a trade-mark in an action for its infringement should show an exclusive right to it. The right must be exclusive as against defendant. The principle upon which relief is granted, is that defendant shall not be permitted, by the adoption of a trade-mark which is untrue and deceptive, to sell his own goods as those of plaintiff, thus injuring the latter and defrauding the public: *Newman v. Alvord*, 51 N. Y., 189.

#### TRESPASS.

1. Where a party is ejected forcibly from a car, and brings an action of trespass, and in his declaration alleges secondary or consequential damages by reason of detention, etc., a demurrer is properly sustained, as the declaration shows a case in which trespass at common law will not lie, that action being always for immediate and direct injury: *Barnum v. B. & O. R. R. Co.*, 5 West Virginia, 10.

2. In an action for being ejected from a railroad car, it is not sufficient to aver generally that the party was wrongfully ejected, but it must be sufficiently set forth that his expulsion was improper and wrongful; i. e., being *rightfully* in the car, he was illegally expelled: *Ib.*

3. An action of trespass lies against an officer who attaches the goods of a stranger, notwithstanding they are so intermingled with those of the debtor that the officer can not distinguish them, if the owner is present and offers to select his and is prevented from so doing by the officer: *Yates v. Wormele*, 60 Maine, 495.

#### TRIAL.

Where a party proposes to impeach a witness by proving inconsistent written statements, it is sufficient to show the witness, or read to him, the paper, and if its genuineness is admitted, the party can introduce it when he has the case and the right to put in evidence; and it is not the legal right of the other party or the witness to enter into any explanation of the contents of the paper until after it has been introduced in evidence. It is within the discretion of the court, however, to vary the order of proof: *Romertze v. E. R. N. Bank*, 49 N. Y., 577.

#### TRUST AND TRUSTEE.

1. A fund being settled by a Chancery Court on a married woman, the court appointed a trustee, who was ordered to give bond in another court of the Chancery District, and then to receive the fund and make annual reports and settlements in the latter court:

*Held*, that the order as to the reports, etc., was void, and conferred no jurisdiction on the court: *State for Barker v. McAuley*, 4 Heiskell, 424.

2. The order of the court to which the trustee was directed to report, appointing a new trustee, and directing him to settle with the administrators of the former

trustee, and a settlement made with them, were held to be no protection to the administrators, the beneficiary not appearing to have been a party or to have taken any part in the proceedings: *Ib.*

5. An appointment of a trustee to sell land in place of one who has died, made on motion simply, is void: *Williams v. Neil, Ib., 279.*

4. It seems that the heirs of a trustee to sell need not be parties to a stationary proceeding for the appointment of a new trustee: *Ib.*

5. The statute of limitations does not run against an express trust, until it is repudiated or denied by the trustee: *Gardner v. Gardner, Ib., 303.*

6. A trustee will be held to take an estate to continue just so long as the purposes of the trust require: *Bowers v. Bowers, Ib., 294.*

7. A condition attached to a power of sale contained in a trust deed, that the trustee shall only sell by and with the consent of the grantor, to be manifested by his uniting in the conveyance, is valid. It is an essential condition and can not be dispensed with. If no provision is made for the execution of the power in case of the death of the grantor, it is extinguished by such death: *Kissam v. Dierkes, 49 New York, 602.*

8. Evidence of the object and purpose for which a conveyance was made, is not admissible to convert the deed purporting to be an absolute conveyance into one of any trust not expressed therein: *Gerry v. Stimson, 60 Maine, 186.*

9. Where such a conveyance was intended to be in trust for the grantor and his wife, but the trust was not expressed in the deed, no resulting trust can arise from the subsequent payment of money by the children of the grantor: *Ib.*

10. If a *cestui que trust* be induced by fraud to discharge the trust, it must be considered as extinguished so far as an innocent purchaser of the trust property who buys, relying upon the discharge, is concerned: *Penn. R. R. Co. v. Mayo, Ib., 306.*

11. But if a person whose own note is deposited in trust for others, among whom its proceeds are to be divided, obtain possession of it without the consent of the *cestui que trust*, an action for money had and received brought against him in the name of the depositary, by and for the benefit of one of those entitled to a share of the amount due on the note, is maintainable; nor can the suit be discontinued by the nominal plaintiff or his assignee, without the assent of the party in interest: *Ib.*

12. The obligee in a bond secured by a trust deed, delivers the same to a third party with the understanding on the part of the obligee that the bond was to be delivered to the obligor; and that such third party was then to become the payor of the debt, and the bond is to be delivered to the obligor; it is

*Held*, there being no allegation or proof of fraud, in a bill brought by the executor of the obligee to enforce the trust, that the bond was cancelled and the trust discharged; *Piercy's Heirs v. Piercy, Ex'r., 5 West Virginia, 199.*

#### USURY.

1. Usury laws are designed to protect the borrower from being obliged to pay more than the amount limited thereby, for the loan or forbearance of money; and not to prevent the lender from receiving such excess from third parties, who voluntarily undertake to pay it: *McArthur v. Schenck et al., 31 Wis., 673.*

2. A. proposes to buy of B., a farm valued at \$2,500 cash, if he can borrow the money, and applies to C. therefor. C. offers, through B. as his agent, to loan the amount to A. for thirty dollars in excess of the highest legal interest; and upon A. refusing to borrow on those terms, B. agrees to pay the thirty dollars, or to accept for the land \$2,470, and A. thereupon receives from C. and pays to B. the last named

sum, and gives his note and mortgage to C. for \$2,500, at the highest legal rate of interest:

*Held*, in an action by C. against A. that there is no contract on A.'s part to pay usurious interest, and that the note and mortgage are valid: *Ib.*

#### VENDOR AND VENDEE.

1. After a contract of sale has been rightfully rescinded by the vendor on account of fraud on the part of the vendee, the contract is at an end, and no act on the part of the vendor alone can revive it: *Kinney v. Kiernan*, 49 N. Y., 164.

2. Consequently, after such a rescision, an action by the vendor against the vendee upon the contract of sale is not maintainable. And the bringing of such an action will not (without judgment thereon) revive the contract of sale so as to constitute a bar to an action for conversion previously brought by the vendor against a third party, who had received a portion of the property from the fraudulent vendee: *Ib.*

3. So, also, the receipt by the vendor from the vendee of compensation in any form or upon any basis for that portion of the goods which the latter has retained, will not affect the title to the residue or the action pending for the conversion thereof. A settlement, therefore, with the vendee, of the action upon the contract of sale from which is expressly excluded that portion of the goods for the conversion of which the first action was brought, will not affect that action. So long as the settlement is confined to the portion of the goods retained by the vendee, it is immaterial to the defendant in the first action whether it is in the form of a payment as on a purchase or of compensation for a conversion. Nor is it material whether upon such settlement the vendor retains the original consideration received under the contract, or whether other compensation is substituted. It is not a revival of the old contract, but a new one different from and embracing only a part of the subject of the former (Grover and Allen, J. J., dissenting): *Ib.*

4. A contract to sell and convey land can only be performed by giving a deed that will vest in the grantee an indefeasible title: *Delavan v. Duncan*, *Ib.*, 485.

5. Where, under such a contract, the vendee is prepared to pay the purchase money, but in consequence of the title being incumbered the vendor is unable to perform, a tender of the purchase money is not necessary in order to preserve the vendee's right under the contract: *Ib.*

6. Where an order is sent to a merchant or manufacturer of goods in which he deals, silent as to price, and the order is accepted, the law fixes the price at the current rate at which the goods are sold, and the party ordering is equally bound as if the price had been stated in the order. So, where an order is given for two articles mixed, to a manufacturer of such a mixture without specifying the proportion of each article, the manufacturer is empowered to compound the same in the usual manner in which the mixture is prepared for market, and an acceptance of the order makes a valid contract to that effect: *Konitzky v. Meyer*, *Ib.*, 571.

7. Grantee of land who mortgaged it back for purchase money, can not set up a mere defect in the grantor's title as a defense to a foreclosure of the mortgage, nor ask a rescission of the contract on that ground, but must rely on his covenants: *Booth v. Ryan*, 31 Wisconsin, 45.

#### VENDOR'S LIEN.

1 Two sub-purchasers of land subject to a vendor's lien, buying on the same day, held to contribute ratably to the purchase money: *Wilkes v. Smith*, 4 Heiskell, 86.

2. If one of two sub-purchasers, liable to contribute to the discharge of a vendor's lien, owe a part of the purchase money to the original vendee, that will be first applied, and he will contribute *pro rata* to the remainder: *Ib.*

3. The vendor of a tract of land sold by title bond, assigned one of the purchase notes to the complainant, and agreed not to make a deed to the purchaser until the note was paid. The vendor and purchaser rescinded the contract of sale, and the vendor sold to another by title bond:

*Held*, that the note was a lien on the land in the hands of a second purchaser: *Young v. Atkins, Ib.*, 529.

4. Where the legal title of land is conveyed, the implied lien of the vendor for the price does not pass by assignment of the debt; otherwise, where a title bond only is executed: *Tharpe v. Dunlap, Ib.*, 674.

#### VESTED RIGHTS.

Where the owners of certain lands dedicate a portion to public uses as parks, esplanades, or otherwise, individuals purchasing from the town proprietors lots facing on such public grounds, subsequent to their dedication, and making lasting and valuable improvements thereon, when lots are enhanced in value by their position, and would be made of less value by a change of such grounds from public to private use, have a vested interest in the trust which no legislature can abridge or destroy. And the repeal of a statute under which a right has vested, does not divest or destroy that right: *Comm'rs of Franklin County v. Lathrop*, 9 Kan., 453.

#### WAR.

1. Personal chattels of a non-combatant citizen captured in battle during the civil war, and sold by the soldiers of the capturing party, U. S. A., to a citizen, and demanded of him by the owner within twenty-four hours after capture:

*Held* subject to the *jus postliminii*: *Elrod v. Alexander*, 4 Heiskell, 342.

2. Trover will not lie for horses taken in West Tennessee during the war, under military orders, for the use of the U. S. Army, and to prevent them falling into the hands of Confederate troops: *Thomasson v. Glisson, Ib.*, 615.

3. As to parties living in opposing sections, interest did not run during the war: *McGaughy v. Berg, Ib.*, 695; *Blake v. Nerill, Ib.*, note.

#### WAY.

1. Where riparian proprietors have laid out and sold their land in lots as delineated upon a plan having streets indicated thereon, terminating upon a navigable stream, such streets will be considered as dedicated to the use of purchasers of such lots and of the public, down to the water at all stages of the tide, unless there be some express reservation of the flats, although the lines upon such plan, indicating the boundary of the tier of lots nearest the river, be drawn at high water mark *Stetson v. Bangor*, 60 Maine, 313.

2. The conversion of a way, dedicated to the use of purchasers of adjoining lots into a public way, does not authorize the award of more than nominal damages: *Ib.*

#### WILL.

1. Where a will contained the following provisions: "I direct that all my just debts be paid, and, for that purpose, I authorize the sale, by my executrix, of any of my estate—real or personal." . . . "I hereby charge all my real estate, with the payment of all the legacies and annuities named in my will." \* \* \* "If I appoint my wife the guardian of the person and estate of my son, during his minority, and also executrix of this, my will, and authorize her to sell any of my real estate, and request that no bond, or a bond of nominal amount only, be required of her as executrix;" it was

*Held*, that the authority to sell the testator's real estate therein contained, was given to said executrix, as executrix, and not to her personally; and, consequently

after her subsequent marriage and the consequent extinguishment of her powers as executrix, as provided by chapter 156, section 17, of the revised statutes, the administrator *de bonis non* with the will annexed then appointed, succeeding to the powers which said executrix previously had, (see section 27, chapter 156 of the revised statutes,) had the same power to sell any of said testator's real estate for the payment of debts: *Bailey, adm'r, v. Brown*, 9 Rhode Island, 71.

*Held, further*, that notwithstanding a provision in the will that the legacies and annuities therein named were payable in one year after the death of the testator, yet if they were not all paid within one year thereafter, the executrix, and the administrator in her place, retained the power to sell the real estate for their payment after the year had elapsed: *Ib.*

*Held, further*, that his authority to sell the real estate did not cease at the expiration of the year, within which, by the terms of the will, the legacies and annuities therein named were to be paid, or because more than three years (the time allowed by law for the settlement of estates had elapsed, since the probate of the will. That so long as the administrator retained the right to pay the debts and legacies, he still retained the power to sell the real estate for their payment: *Ib.*

2. J. D'W., by the third clause of his will, provided as follows: "I give, bequeath and devise unto my son, John D'W., Jr., during his natural life, the use and improvements of the farm where I now live, with the live stock and farming utensils belonging thereto, and after his decease, I give, devise and bequeath the same estate, both real and personal, to my grandson, Algernon L. D'W., his heirs, executors, administrators and assigns, forever; provided, however, that if the said A. L. D'W., should die without lawful issue living at the time of his death, then, in that case, I give, bequeath and devise the same estate, both real and personal, unto his surviving sisters, Susan A. D'W., Elizabeth V. D'W., and Maria G. D'W., or such of these as may survive the said A. L. D'W., their heirs and assigns forever."

*Held*, John D'W. being dead, Amelia D'W. having died, leaving children, Algernon, Elizabeth and Maria living, and Elizabeth being married; *First*, that the estate given to Algernon L. D'W. was a fee-simple, subject to the conditions expressed in the will; *Secondly*, that the gift over referred to issue living at his death, and was not void as referring to an indefinite failure of issue, but was good as an executory devise; and, *Thirdly*, that the sisters of Algernon, who survived him, would take the estate in fee (if he died without leaving issue living), but that the issue of his sister Amelia, the sister who died before him, took no interest in the estate, and, that if no sister of Algernon should survive him, the fee once vested in him would not be diverted. *D'Wolf et al. v. Gardiner, Ib.*, 145.

5. A mere naked possibility or expectancy can not be assigned at law, but a contingent right, founded on an executed instrument, where the contingency does not depend on the existence at a particular time of a person now in existence, can be released to the *terre tenant*, or person in possession by a rightful title (although *quære*, whether it can be so released to strangers). Hence it was

*Held, fourthly*, that the sisters of Algernon D'W. might pass their interest in said estate to him, by any instrument operating by way of estoppel or release, the power being given to his married sister to release her interest, jointly with her husband, by chapter 728 of the statutes, even if it did not exist under the provisions of section 6 of chapter 136 of the Revised Statutes. *Ib.*

6. A testator devised to his wife ten dollars to be paid her by his executor in addition to the provision made for her support and maintenance during her natural life by his devisees, agreeably to the conditions of their bond for that purpose which was to be in lieu of dower; and charged all his property devised to the faithful performance of said bond, and in the event of the non-performance thereof, enough of

his estate thus devised to be sold by his executor as will provide such support. He then devised three specified parcels of real estate in fee-simple to his sons, B. and F., subject to the foregoing charge of his wife's maintenance, in the proportion of two-fifths of the amount required therefor, and also to the payment of his debts in the same proportion; and the remainder of his estate to two daughters and a third son (the executor), in equal proportions, subject to the same charge in the proportion of three-fifths of the amount required therefor:

*Held*, that notwithstanding the bond with the performance of the conditions of which the property devised was charged was intended to be executed on the same day with the will, but in fact was not until two months afterwards, and after the death of the testator, the provisions in the will relate to the bond, and its provisions are binding and constitute a valid charge upon the estate devised: *Pettingill v. Pettingill*, 60 Me., 411.

7. *Also held*, that it was the duty of the executor to see whatever was needful for the maintenance of the testator's widow in accordance with the provisions of the will, if not furnished by the devisees, should be supplied, and the proper contribution due from any delinquent devisee enforced: *Ib.*

8. *Also held*, that the proper method of determining how far the power of sale conferred upon the executor by the provisions of the will should be exercised, is the settlement of an account in probate, wherein he should charge himself with his own fifth of all expenditures less the value of the widow's labor in his family, and with whatever has been contributed by either of the other legatees or collected from them and be allowed the cost of maintenance: *Ib.*

9. *Also held*, that the statute of limitations is not applicable to the costs of maintenance sustained by the executor in behalf of the widow of the testator: *Ib.*

10. A writing signed by the widow stipulating that no person shall ever call on a certain one of the devisees of the property thus charged, or his property, for any part of her support as long as there is any of the other property left, is not a waiver of support from the estate, and is void: *Ib.*

11. A., by his will, devised all his estate, real and personal, to remain in the hands of his executors, to be managed for the benefit of his child or children; that his executors appropriate as much of the yearly income of his estate as they think necessary to the support, etc., of his child or children, and pay the residue to his wife during life or widowhood; at her death or marriage, the whole estate and income to vest in his child or children. If any child should die under twenty, leaving no child or children, or the descendants of such, and his "wife be married or dead," the entire interest of such child to go to his brother or sister, or descendants of such; or if no brother or sister, nor descendants of such, then his entire estate to go to the brothers and sisters of the testator. The testator had two children, who died before the widow:

*Held*, that the death of the children, leaving the wife unmarried, was a contingency not provided for by the will, and that she took the whole estate absolutely as heir and distributee of the surviving child: *Andrews v. Andrews*, 4 Heiskell, 54.

12. A bequest to children as a class, to take effect after the termination of an intervening estate, will include after-born children: *Bowers v. Bowers*, *Ib.*, 293.

#### WRIT OF POSSESSION.

A court of equity always has jurisdiction to carry into effect its own decrees and is not *functus officio* until the decree is executed by the delivery of possession. And where a person, not a party to the suit, is in possession of property which is the subject of the decree, and refuses to give it up, it is usual to make a rule upon him, and unless he shows a paramount right in himself, to order the property to be delivered up, and to enforce such order by attachment if necessary: *Trimble et al. v. Patton, Trustee*, 5 West Va., 432.

## DIGEST OF RECENT BANKRUPT DECISIONS.

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### ABATEMENT.

*Death.* When a debtor dies between the time of the service of the rule to show cause, and his adjudication as a bankrupt, the proceedings will be abated: *In re Frazier v. McDonald*, 8 B. R., 237.

### APPEAL AND REVIEW.

From Circuit to Supreme, and District to Circuit: *In re Casey*, 8 B. R., 71.

ATTACHMENT TO SATISFY FINAL JUDGMENT.—*See Sheriff.*

When the law recognizes the existence of a lien, and authorizes a provisional attachment of sufficient property to satisfy the final judgment, being to determine simply the amount of the lien, such an attachment is not dissolved by section 14 of the Bankrupt Act, when issued within four months prior to commencement of proceedings in bankruptcy: *U. S. Sup. Court, Marshal v. Knox*, 8 B. R., 97.

ADMINISTRATOR.—*See Surviving Partner.*

### AGENT.

1. *Fiduciary Capacity.* The statutes of Wisconsin allow arrests in all actions of tort, and for money received and misapplied by an agent, factor or broker. The 26th section of the Bankrupt Act exempts the bankrupt from arrest upon all debts or claims from which his discharge would release him. Section 19 allows demands "for goods or chattels wrongfully taken, converted or withheld" to be proven:

*Held*, that the words "fiduciary character," in section 33 of the Bankrupt Act, do not refer to demands arising out of torts, such as trespass or trover.

2. Money, collected by an agent under an agreement to account and pay over the balance of proceeds monthly to his principal, is not a debt created in a "fiduciary character" within the meaning of the Bankrupt Act. A bankrupt is not liable to arrest on such a debt, and it is discharged in bankruptcy.

3. The words "fiduciary character," in the act of 1867, are essentially the same as "any other fiduciary character," in the act of 1841, which act has been construed by the United States Supreme Court, in *Chapman v. Forsyth*, 2 How., 202, as not including cases of this character, but as having reference to special or technical trusts, as distinguished from such as the law implies from the contract of the parties, (citing *Cromie v. Cotting*, 104 Mass., 245, and disapproving *In re Kimball*, 2 N. B. R., 74 and 114 quarto, in which case Circuit Judge Nelson affirmed the opinion of the District Judge, "that a commission merchant, who received property from a country dealer to sell and remit the proceeds, after deducting his commission for selling, was liable to arrest in an action for not paying over the proceeds.")

4. When an agent is to account monthly with his principal, a court might infer that the agent was allowed to mingle the money collected with his other funds, and to consider himself an absolute debtor for that amount, and if authority to do so may be implied from the course of dealing, the agent would be exempted from liability for a conversion of the money: *Hopkins, J., United States Circuit Court; Grover & Baker v. Clinton*, 8 B. R., 312.

ASSIGNEE—Duties—Removal of—Choice of—*Res adjudicata*.

1. It is the duty of an assignee to disclose to the creditors, upon inquiry, the main facts known to him relating to the condition and assets of the bankrupt estate. It is not a sufficient excuse that he could not give accurate estimates as to what the estate would pay. His books must be always open to the inspection of creditors.

2. The assignee must also make, in season, the inventory and reports required of him by the Bankruptcy Act and the rules of the Supreme Court. (See sections 17 Bankruptcy Act, and Rules 19, 20, 21 and 28.) When an assignee has clearly failed to give such information as he is bound to give, and when he, moreover, has omitted to make the reports required, the Court will remove him.

3. On a revisory petition for removal to Circuit Court, the proper practice is to direct the District Court to make the removal and the new appointment instead United States Circuit Court, Ills., N. D.: *In re Perkins*, 8 B. R., 56.

4. Creditors filed specifications to oppose a bankrupt's discharge on the ground that the bankrupt had fraudulently disposed of his property, contrary to the provisions of the Bankrupt Act. The Court held the specifications not proved as a matter of fact and granted the discharge. The assignee afterwards sued the transferee of the property, setting up in substance the same facts as alleged in the specifications. The transferee sought to enjoin the assignee, on the ground that the case was "*res adjudicata*."

Held, that the former proceeding was *res inter alias acta*, and in no way binding upon the assignee. United States District Court, S. D. N. Y., Blatchford J.: *In re Penn.*, 8 B. R., 93. See *In re Perform*, 8 B. R., 357.

COSTS—Counsel fees—Dismissal.

1. When there are no other debts besides that of the petitioning creditor, on which the debtor may be adjudged a bankrupt, he is entitled to have the proceedings against him dismissed on the payment of the petitioning creditor's debt and costs.

2. In a case where the adjudication has been resisted, the petitioning creditor may recover the costs that are allowed by law to a party recovering in a suit in equity as defined by act of February 26, 1853: 10 Statutes at Large, 161; (General order 31, Rules in Bankruptcy).

3. In such a case a special allowance for counsel fees of petitioning creditors' counsel will not be made: *In re Sheahan*, 8 B. R., 353.

COMMERCIAL PAPER.—Endorser.

1. A suspension of payment of one piece of commercial paper for fourteen days without legal excuse, is an act of bankruptcy.

2. To have a debtor adjudged a bankrupt it is not necessary that he be shown to be actually insolvent. It is sufficient to show that he has committed what the law defines to be an act of bankruptcy. Actual insolvency must be shown when the act committed is only declared to be an act of bankruptcy, when the debtor is insolvent. *In re Wilson*, 8 B. R., 396.

3. United States Circuit Court of Illinois—overruling the order of the District Judge, who refused to enter a rule to show cause and held "that suspension of payment for fourteen days on a single piece of paper does not alone show insolvency."

4. The indorser of a promissory note or bill of exchange who, after due protest and notice, fails to provide for payment of his liability within fourteen days, there-

by commits an act of bankruptcy and may be adjudged a bankrupt upon the application of a petitioning creditor, and it matters not whether the paper is indorsed for accommodation or in the course of business, or whether the indorser is actually insolvent or not: *In re John Clemens*, 8 B. R.. 279.

CONTEMPT.—*See Mortgages.—Lease.*

DEMAND AND NOTICE.—*Trustees.*

1. The filing of a petition in bankruptcy is constructive notice to all the creditors.

2. A demand of goods by an assignee upon one of the trustees under a voluntary assignment is in law a demand on his co-trustee: *Strobaugh v. Mills et al.* 8 B. R., 361.

DIVIDEND.

1. When a judgment on which a supersedeas and stay of execution has been granted by the State Court, pending the writ of error, is proved in bankruptcy, the Bankrupt Court will stay the payment of any dividend on the claim during the pendency of the writ of error. United States Dist. Court, Mich.: *In re Sheahan*, 8 B. R., 345, dissenting from *Avery v. Johann*, 3 N. B. R., 36.

DISMISSAL OF PROCEEDINGS.—*Positive—See Costs.*

A petition under the second section of the Bankrupt Act was filed in the United States Circuit Court of Indiana, to have an order of the District Court reviewed, which dismissed the proceedings in bankruptcy. Prior to proceedings in bankruptcy, some of the stockholders, under a special law of Indiana, had filed a bill in the State Court for relief against the company, on the ground that it had become insolvent. The State Court had appointed receivers to take charge of the property. The case in the State Court was under the Act of Congress of 1866 and 1867, transferred to the United States Court, and the receivers of the State Court were recognized by and continued to act as receivers under the authority of the Circuit Court. The value of the property of the company was between twelve and fifteen million dollars. Independent of the bonded debt, the company had a floating debt of nearly a million dollars. Subsequently to the adjudication in bankruptcy, parties, representing themselves trustees of the stockholders were appointed by the stockholders to buy up all the floating claims of the company by means of a fund raised for that purpose, and they had, accordingly, bought up all the claims with the exception of one of about ten thousand dollars due to one Charles Dwight, who, as was stated in the petition, was the only party dissenting to the dismissal of proceedings.

*Held*, that the purchase of the floating claims having been made in good faith and all the creditors, except those representing a few minor claims, desiring such a result, the District Judge was right to dismiss the proceedings in bankruptcy—the petitioners giving proper security for the payment of objecting creditors. It being evidently for the best interest of all parties, and the desire of a large majority of the creditors, that the corporation should be managed in the customary manner, the Bankrupt Court will not retain the custody and control of its property to assist minor creditors in coercing their claims.

The proper practice in such case, where the claims of the objecting creditors are contested and in litigation, is to require the deposit of adequate security for the payment of the claims of the non-assenting creditors, to remain until any contingency about them is ultimately settled by the highest court to which a case can be

taken the claims to be prosecuted with reasonable diligence; and in default thereof any of the parties in interest to have the right to apply to the District Court for the withdrawal of the bonds and securities so deposited; United States Circuit Court, Drummond, J.: *In re J. C. & L. R. R. Co.*, 8 B. R., 302.

DISCHARGE—EFFECT OF.

1. *Surety—Contingent Debts—Fifty per cent. clause—Fiduciary character.* A suit was brought against sureties upon the bond of a deceased Collector of United States Internal Revenue. One of the defendants pleaded his discharge in bankruptcy in bar of the action as to him (34 section Bankruptcy Act). The complainants referred to and relied on the 33d section of the act, which provides: "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act . . . and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, endorsee, surety, or otherwise." The contingency which made the surety liable to the Government, did not happen before the final dividend; or if it did, the Government made no effort to have the value of the liability ascertained or to prove it in the Bankrupt Court:

*Held*, that the 19th section of the Bankrupt Act, sub-sections 3 and 4, must be construed to mean, that where the payment of a debt can not be enforced until the happening of some contingency, such debt being readily estimated, may be proved; or if the extent of a liability depends upon some contingency, and such contingency is reasonably certain to happen before final dividend, the court may, by some method, determine the value to be placed by the claimant on such liability and admit him to prove it;

That the United States Government is not excepted out of the provisions of the bankrupt law making the discharge a bar to the action: (citing the *United States v. Davis*, 3 McLean, 483).

2. That the defendant was not acting as a public officer, and has committed no defalcation as such; that as surety for the United States Collector he was not acting in a fiduciary capacity and that the discharge is a full and complete bar to the action as against this defendant; United States Circuit Court, Duval, J.: *United States v. Trockmorton*, 8 B. R., 309.

3. Where a bankrupt, after March, 1867, fails to keep proper books of account—such books as will enable an ordinary book-keeper to determine his true financial condition—his discharge will be refused. The question of a fraudulent intent in omitting to keep books is not involved:

Growing crops matured should be entered by the bankrupt on his schedule of personal property and vest in the assignee: *Id.*

4. For a debt contracted in 1863, a note was given at twelve months, and each year thereafter until 1870 the old note was taken up and a new one given—the last note given in 1870:

*Held*, that this was not a debt contracted prior to January 1st, 1869, but comes under the 50 per cent. clause; that it is a presumption of fact that the renewal, being a voluntary contract, and the old note having been surrendered, was a payment and discharge of the old indebtedness. (The amendment of the bankrupt act in regard to the 50 per cent. clause, requires "that unless the assets are equal to 50 per centum on the debts proved, in which the bankrupt is the principal debtor and which were contracted since the 1st of January, 1869, he shall not obtain his discharge, unless a majority in number and value of those who have proved their claims and to

whom he has become the principal debtor since that time, shall file their assent in writing to such discharge.—REPORTER.): *In re Shumpert*, 8 B. R., 415.

EXECUTION.—*See Proof of Debt.*

ENDORSER.—*See Commercial Paper.*

FIFTY PER CENT. CLAUSE.—*See Discharge.*

FIDUCIARY CHARACTER.—*See Discharge—Agent.*

HOMESTEAD.—*Exemptions—Partnership.*

1. Power to exempt and discharge is plenary and has no limitation but the discretion of Congress. Congress has no right generally to impair obligation of a contract; but under the United States Constitution it has a special right to pass a bankrupt law; Legal Tender cases, 12 Wall., 457: *In re Beckercord*, 4 B. R., 59.

2. The individual members of a commercial firm are entitled to have the exemptions allowed them by the bankrupt act set apart to them out of the firm assets where the individual assets of each co-partner are not sufficient; and this since the passage of the amendment of March, 1873, whether the State law permits exemptions out of partnership property or not: *McKercher v. Pettigrew*, 8 B. R., 409.

3. A merchant, while in insolvent circumstances, selling for cash the homestead which he had previously occupied, and not accounting for the proceeds of the sale, and moving into a portion of his store, is not entitled to hold the store as a homestead exempt from his debts. He is guilty of a fraud upon his creditors and the bankrupt act: *In re Wright*, 8 B. R., 430.

("Amendment of the Bankrupt Act of March 3d, 1873:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it was the true intent and meaning of an act approved June eighth, eighteen hundred and seventy-two, entitled "An act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March second, eighteen hundred and sixty-seven," that the exemption allowed the bankrupt by the said amendatory act should, and it is hereby enacted that they shall, be the amount allowed by the constitution and laws of each State, respectively, as existing in the year eighteen hundred and seventy-one; and that such exemptions be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding.")

Judge Rives of the District Court for Western Virginia in the case of *Kean v. White et al.*, 8 B. R., 367, gives an interesting history of the origin of this amendment, the constitutionality of which is generally doubted, but admitted by the aforesaid Judge, who, however, says: "However difficult of solution this amendment seems at first, upon consideration there is a good deal of argument in favor of its unconstitutionality. But if the case had been stronger against the law, it would scarcely become me in my inferior position in the federal judiciary, to show such want of proper deference for a high co-ordinate department as to pronounce their act a violation of the Constitution. This I might be constrained to do if my conviction of its unconstitutionality were clear and settled, and in such a case I should not shrink from the duty to do so. But those who may not yield to my reasoning, will at least agree that it is a case of doubt, which should always be resolved in favor of the Legislature."

4. The words "the true intent and meaning of the act of June, 1872," in the amendment of March 3, 1873, are nugatory and imperative. The mere declarations of the act must be discarded and the enactments alone must be looked at. Citing *People v. Board of Supervisors*, 16 New York, 425, where such declaratory act was held ineffectual "because the Legislature had no judicial authority and could not control the Courts in respect to the construction of statutes in cases arising before the declaratory statute." The amendments must be read together with the original act, and as one law, which will conduce to a clearer understanding:

*Held*, I. That the amendment is constitutional in case, where petition is filed after the passage, and in such cases wherein the petition is filed before passage of the amendment to the act, where, after the passage of the amendment to the act, there remains in the hands of the Court an unappropriated fund. (See instances of the application of this rule in the body of the opinion.)

II. That after the Bankrupt has received his discharge he will not be re-admitted to petition for an additional exemption.

III. That in cases instituted after June. 8, 1872, the right is clear to a homestead as against debts contracted after the Constitution of West Virginia of 1870 went into operation.

IV. That the bankrupt has the right to select a homestead and the property exempt; that the assignee has nothing to do with the selection; that when made, the assignee must report the exemptions, and to certify that they are not excessive; that the report must lie in the clerk's office for thirty days for exceptions, and if there be none, to stand confirmed unless good cause be shown to the contrary. *Raves, J., U. S. District Court, W. Va.: In re Kean v. White*, 8 B. R., 367.

(The practice is to argue exceptions, to report of homestead before the Register in Bankruptcy, who will either certify his opinion to the District Judge under section 6; or who will, if the opposition from either side be withdrawn, make the final order. *Reporter.*) See also: *In re Jordan*, 8 B. R., 180. *Dick, J.*

5. The amendment of March, 1873, is constitutional as to cases where the petition was filed since its passage and under it the exemptions claimed by the Bankrupt supplants the liens of State judgments and decrees; and the bankrupt who files his petition since said amendment is entitled to all the exemptions "as existing in the place of his domicil on the first of Jan., 1871," even though there are judgments in force rendered prior to the passage of the State act giving the increased exemption;

The amendment of March 3, 1873, does not destroy the uniformity of the Bankrupt Act. Congress has the power to destroy existing contracts and to release liens held for their enforcement: *In re Smith*, (*Erskine, J.*) 8 B. R., 401.

6. A bankrupt, whose petition was filed in May, 1871, and had been allotted an exemption in August, 1871, under the provisions of the Bankrupt Act as it then stood, applied, after the amendment of June, 1872, for the additional exemptions allowed by that amendment. There was remaining in the hands of the assignee an amount of money out of the proceeds of sales made by him of property claimed to be exempt under the amendment of 1872:

*Held*, that the general rule, that no statute has a retrospect beyond the time of its commencement is not understood to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights already existing, and that the exemption provision of the Bankruptcy Act is such remedial statute.

7. The bankrupt is entitled to the additional exemptions claimed, and where the

real estate has been sold prior to June, 1872, the bankrupt was entitled to an exemption out of the proceeds of said real estate in the hands of the Court, equal to the amount of real estate he would have been entitled to retain had his petition not been filed until after June, 1872: *In re Volger*, 8 B. R., 132.

(*Quere*—Is not the title of the assignee relating by operation of law to the date of filing of the petition, an absolute vested right already existing? and can this vested right be interfered with?—*Reporter*.)

8. Petition filed March 2, 1872. Bankrupt had conveyed real estate and personal property exempt under the State laws of Tennessee in trust to secure a preferred creditor. There was a vendor's lien due on the land. In 1870 the Legislature of Tennessee changed the existing homestead laws so as to increase the homestead from \$500 to \$1000, and repealed the existing provision that a homestead must be registered:

*Held*, that, notwithstanding the petition was filed prior to the amendment of June, 1872, the bankrupt was entitled to a homestead of \$1000, though there was no registration of the homestead;

That the bankrupt was entitled to the exemption of the personal property conveyed in trust to secure preferred creditors, there being no fraud in the conveyance;

That the assignee is the proper party to select the specific articles of personal property exempt, when the bankrupt has more in number of the species exempt, than the law allows;

That the vendor's lien must be paid first out of the proceeds of the real estate and then the homestead, less the amount of the vendor's lien: *In re Forgason*, MS. opinion, Trigg, J., Dist. Court M. D. Tenn., overruling Register's opinion.

9. West & Lewis purchased property for which they took a title bond in their firm name. West erected a dwelling-house on one of the lots and took possession of it for his family. Lewis built on another lot, and on the remaining property a store-house was erected. The title bond in the lot on which West had built was without consideration assigned to West's father, who procured the legal title. W. & L. then were thrown in bankruptcy, when West's father conveyed the lot in question to Mrs. West, Jr. On a bill filed by the assignee the assignment of the title bond and the conveyance to the wife were declared fraudulent as against the assignee. The proof showed that although the title bond was taken in the name of the firm, the understanding of the members of the firm was that each should own the lot on which he lived, in severalty. The assignee resists the claim to a homestead: 1st, On the ground that the lot was either partnership property, or that they were tenants in common, and that the statute of Nebraska does not give a homestead unless the party claiming it is the sole owner; 2nd, Because the right to the homestead was lost by the fraudulent conveyance:

*Held*, that there had been an equitable partition of the lots purchased, and that consequently they were not tenants in common in respect to this lot; but if it were owned by them as tenants in common, the court does not admit that a homestead right could not be asserted to it in favor of a head of a family, otherwise entitled to the exemption. The authorities, however, are conflicting on this point: Citing 1 Am. Law Reg., n. 3, 655, and cases cited. See also, *Trustees v. Maddocks*, 6 Allen, 427; *Smith v. Smith*, 12 Cal., 216; *McNeade v. Whaley*, 31 Cal., 354; *Thorn v. Thorn*, 17 Iowa, 19.

*Held*, that when a statute speaks of property *owned* by a debtor, not ownership of the full legal title is meant; but it is sufficient that the interest be such as may be sold on execution or subject to payment of debts:

*Held*, further, that when a fraudulent conveyance is made and set aside at the in-

stance of the assignee, the husband or head of a family is not estopped to set up the right to a homestead exemption: U. S. Cir. Court Nebraska; *Bartholomew v. West*, 8 B. R., 12.

(Since the above was in type, and too late for this number, we received an able opinion by Bond, J., U. S. Circuit Court, reviewing the several district court decisions on the constitutionality of the amendment of March 3, 1873, and with them reviewing the decision of Trigg, J., in *re Ferguson*. Judge Bond declares the amendment unconstitutional as far as it undertakes to give a judicial construction to favor legislation, and as far as it interferes with vested rights.—*Reporter*.)

#### INJUNCTION—NO PREFERENCE.

A partnership had a deposit with a banker and a balance to their credit of several hundred dollars. One of the partners borrowed \$100 from his firm and with \$900 additional money of his own he went to the banker and there purchased a draft on New York, depositing the \$1000 in his firm's name and giving them a firm check in payment for the N. Y. draft. While the exchange was made out by the cashier the banker was preparing a general assignment for the benefit of all creditors, and there were no funds in the hands of the drawee to meet the draft. A. applied for an injunction against the assignees asking to restrain them from using the \$1000 in paying a 20 per cent dividend to the general creditors:

*Held*, that the title to the money paid for the worthless bill of exchange of \$1000 vested in the banker, that A. stood on no better footing than any other creditor or depositor of the banker; that he was only entitled to his *pro rata* share of assets and that there was no equity on the face of the bill: *In re John King*, 8 B. R., 285.

(*Note*—A similar opinion was delivered by Chancellor W. F. Cooper, of Nashville, in the case of *Wiggers v. People's Bank*, though here the drawee had funds of the drawer, and where the complainant insisted that the drawing of the check was an equitable assignment and an appropriation *pro tanto* of said funds.—*Reporter*.)

#### JURISDICTION—(See Mortgage.)

1. Complainant, an assignee in bankruptcy, is a citizen of Illinois, and defendant a citizen of Iowa. Suit is brought in U. S. Circuit Court for Iowa to recover the amount of an unpaid assessment upon stock in an insurance company, being over \$500. It is claimed by defendant that, although there is no express provision depriving either this court or the State courts of jurisdiction of actions, in behalf of assignees in bankruptcy, yet that the jurisdiction is taken away as a necessary or implied effect of the jurisdiction which is conferred by the bankrupt act upon the U. S. District Courts as courts of bankruptcy:

*Held*, that the requisite citizenship and all the requirements of the 11th section of the judiciary act existing, there is no reason why, with the consent and under the direction of the proper bankruptcy court, an action like this should not be enforced either in the State court or U. S. Circuit Court. The word *exclusive* as descriptive of the jurisdiction of the U. S. District Courts sitting in bankruptcy seems to have been carefully avoided in the act of bankruptcy. The State courts are *not* deprived of jurisdiction in ordinary common law and equity suits, simply because brought by the assignee in bankruptcy; citing many cases, especially *Sherman v. Bingham*, 7 B. R., 497). It follows that the U. S. Circuit Court may exercise its like jurisdiction. Repeals by implication are not favored. The mere grant of jurisdiction to a particular court, without any words of exclusion does not oust any other court of the powers it possessed. The jurisdiction of the U. S. Circuit Court under the judiciary act is plain: *Dillon, J.: Jayson v. Ditts*, 8 B. R., 193.

2. As to jurisdiction of State courts: *Voorhees v. Frisbie*, 8 B. R., 152. Assignee in bankruptcy may sue in the State court as well as in the U. S. court to recover property disposed of by the bankrupt in fraud of the bankrupt act. Sup. Court N. Y.: *Gilbert v. Priest*, 8 B. R., 159.

3. The U. S. District Courts have full jurisdiction to suspend or control all proceedings in the State courts against the bankrupt or his assets. The adjudication in bankruptcy does not *per se* divest the State courts of jurisdiction over the bankrupt or his assets, or suspend proceedings pending therein. The bankrupt court will only exercise its control over litigants in the State courts when necessary to sustain or protect an equity of the bankrupt estate, or to prevent a sacrifice of the interest of the general body of creditors: *In re Davis*, 8 B. R., 167.

#### LEASE—Contempt.

A lease to S. terminated by condition broken after S. filed his petition in bankruptcy, and before the appointment of an assignee. The lessor, by summary proceedings in the State courts, evicted S. and took possession of the premises leased. On petition of S.'s assignee in bankruptcy, to require the lessor to restore possession or show cause why he should not be attached for contempt:

*Held*, that the possession of the bankrupt by authority from the Register, after petition filed, is the possession of the bankrupt court, and any interference therewith, except by leave of that court, is in contempt of its authority. Ordered, that lessor restore possession of the property leased within twenty days, or in default, attachments absolute for contempt shall issue: *In re Steadman*, 8 B. R., 319.

#### LEVY—See Proof of Debt.

#### MORTGAGE—Contempt—Jurisdiction—Adverse Claim.

Jurisdiction to foreclose mortgages upon bankrupt's estate is not included in the powers summarily to be exercised under the first section of the bankruptcy act; especially not when alleged mortgagee claims adversely to the assignee and other mortgagees, or when the title of the applicant is disputed, or the amount claimed is denied to be due. In such cases a suit must be instituted to which all persons claiming adversely must be parties. U. S. C. C. Vermont: *In re Casey*, 8 B. R., 71.

I. Under the law as it exists in Michigan (and as the Court believes in most of the States of the Union), a mortgage of real estate does not vest in the mortgagee any title or estate in the property. It is only a charge upon the property and an incident merely to the debt thereby secured; the title, estate and possession, with all their incidents, remains in the mortgagor.

II. All the estate of the bankrupt, and all his right, title and interest in property, whether incumbered or unincumbered, are in *custodie legis*, and under the sole and exclusive control of the bankruptcy court from the filing of the petition to close of proceedings.

III. No portion of the estate or the title thereto, or interest therein, or charge thereon, can be sold, transferred, prosecuted, or enforced, or in any manner interfered with, except under the direction and by authority of the bankrupt court.

IV. Any attempt to enforce liens and incumbrances, pending the bankruptcy, by the process of any other court, or by any authority whatsoever, without leave of the bankrupt court first obtained, is in contempt of its jurisdiction and authority, and without any validity whatsoever.

V. On application and showing that there will be no injury to the estate, the bankrupt court will treat proceedings in other tribunals as valid and binding.

VI. Jurisdiction and control over secured as well as unsecured creditors exists and may be enforced as well before as after proof of debt.

VII. A secured creditor has no greater or better right to proceed against or receive payment from the particular fund or asset upon which he has a lien, without the necessary preliminary steps of proving his debt than an unsecured creditor has to proceed against and receive payments from the general assets without such proof.

VIII. The above propositions apply equally to proceedings in the courts and proceedings *in pais* for the enforcement of liens and other securities, begun after the commencement of proceedings in bankruptcy.

IX. As the propositions stated apply to proceedings in the courts where the assignee can appear and oppose, *a fortiori* they apply to a foreclosure by advertisement in which he can not appear and oppose.

X. A bill to set aside a sale made to enforce by advertisement is maintainable without averments that the mortgaged property was of greater value than the mortgage debt, or that the property was sold for an inadequate price, or that the estate has been injured.

XI. The mortgagee may, if it is shown that the estate has suffered the injury, have the sale confirmed in these proceedings by answer and cross bill.

XII. The proceedings to foreclose and sale thereunder without authority of the bankrupt court are equally invalid where mortgagee becomes the purchaser, as where a stranger buys: *Phelps v. Sellick*, 8 B. R., 391, citing numerous cases in U. S. Supreme and Circuit Courts.

MARRIED WOMAN—*See Separate Estate.*

PARTNERSHIP—*See Homestead and Exemptions—Surviving Partner.*

PRACTICE—*Order to Show Cause—See Dismissal.*

It is a well established fact in England and in the United States that when there are partnership and individual debts, and there are no partnership assets, and no solvent partner, the debts of the firm and the individual members can be proved, and the estate is to be distributed *pas passon* among the creditors: *In re Knight*, United States Circuit Court Wisconsin, 8 B. R., 436.

Where upon an order to show cause why the debtor should not be adjudged a bankrupt, the debtor demurred and the demurrer was overruled as frivolous:

*Held*, that it is discretionary with the Court, on overruling the demurrer, whether to adjudge the debtor a bankrupt or to allow him to answer upon terms and to file a general denial referable instantly to the Register: *In re Bentnam*, 8 B. R., 94.

PREFERENCE OF CREDITORS.—*Burden of Proof—Reasonable Cause.*

To establish intent to prefer a creditor, it is sufficient for the assignee to show that the bankrupt while insolvent, paid or secured the creditor in full without making adequate provisions for the other creditors, and this will place upon the defendant the onus of proving to the Court that at the time of making the transfer or payment, neither the bankrupt, nor his creditor knew he was insolvent: *Stought v. Mills, et al.*, 8 B. R., 362.

PROOF OF DEBT.—*Provable Debt—Secured Creditor—Usury—See Discharge.*

1. A. held a mortgage on the property of the bankrupt, to secure him as indorser of their paper to a large amount. The holders of this paper proved their claims on their respective notes against the estate of the bankrupt as debts for

which they held no security, they having no knowledge of the mortgage above mentioned to A., when they received the notes bearing the indorsement :

*Held*, that the security was not personal to the surety (A.), nor intended for his personal indemnity only, for the reason that the mortgage was conditioned for the payment of the indorsed notes as well as for the indemnity of the indorser; that it makes no difference whether the trust is created and defined by law, or written out by the parties; that the claimants in this case, before they proved their debt had such a lien or security as prevented them from proving their claims for the whole amount as unsecured debts, without releasing their equitable interest in the mortgage before referred to. When, however, such proof was made through ignorance or mistake, a creditor ought to be allowed to withdraw his proof and prove as a secured creditor; but after the taking of the dividend upon his whole debt, as an unsecured creditor, to the prejudice of the general creditors, he must be held to his election: *In re Jaycox v. Green*, 8 B. R., 241.

2. Court of Bankruptcy has jurisdiction to allow or disallow claims against a bankrupt's estate, and therefore to pass upon their legality; and this, although it may not have jurisdiction to enforce a penalty imposed by the State law, on account of an act making a claim illegal on the ground of usury: *In re Pitts*, 8 B. R., 78.

3. Where an assignee in bankruptcy is not satisfied with the legality or correctness of any claim filed with him, the proper practice is for him to move to have it expunged under the 34th rule of the general orders in bankruptcy and proceed as in that rule directed: *In re Firemen's Ins. Co.*, 8 B. R., 123.

4. The petitioning creditor's debt was founded on a debt due by judgment for damages for a breach of promise to marry. Before the petition was filed, a writ of error and supersedeas was sued out in the State Court for the purpose of setting aside the judgment. The notice of the writ of error and necessary bond for the supersedeas were filed after the petition for adjudication. Before the petition for adjudication an execution had been issued and was levied upon land conveyed by the debtor since the rendition of the judgment. A motion to dismiss was made on the following grounds: 1. The petitioning creditor has no longer a provable debt in bankruptcy on account of the writ of error and bond for supersedeas. (See Act of Bankruptcy as to what is a provable debt.) 2. Petitioner having elected to proceed in the collection of her judgment by a levy, could not abandon the levy and resort to the Bankruptcy Court:

*Held*, that under the law in force in the State of Michigan a writ of error and supersedeas of execution leaves the judgment intact, and such judgment is in no manner superseded, invalidated or affected; the execution alone is stayed or superseded. Such judgment is a provable debt in Bankruptcy: Citing, United States District Court, Michigan, *In re Sheehan*, 8 B. R., 345; *In re Sidle*, 2 B. R., 77; 2 *Tidd's Pr.*, 1159, 1446; *O'Flynn v. Eagle*, 7 Mich., 306; 3 Story Const. Law, 1521; *Allen v. Mayor*, 9 Ga., 286; 1 Durn. & East, 337.

*Held*, that the levy by a creditor on property sufficient to satisfy his debt does not estop him from moving to have his debtor adjudged a bankrupt, but the filing of the petition in bankruptcy will work a waiver of the levy, and an election by the creditor to proceed in the Bankrupt Court: *Ib.*

#### PLEA—DISCHARGE.

A discharge under the Bankrupt Act of 1867, by a Bankruptcy Court having jurisdiction, when properly pleaded in bar to a suit in a State Court, whether at law or in equity, is conclusive, and can not be attached for fraud in obtaining it: *Freeman, J.* Supreme Court of Tennessee, 8 B. R., 404.

When petition to Circuit Court to re-examine a decree of the District Court in Bankruptcy, prays the Court to "recover" and reverse that decree, and "to grant such further order and relief as may seem just," the jurisdiction invoked must be regarded as the supervisory jurisdiction which is allowed to Circuit Courts acting as Courts of Equity by second section of the Bankruptcy Act. From the action of the Circuit Court in the exercise of such jurisdiction an appeal lies to the Supreme Court: *Mead v. Thompson*, United States Supreme Court, 8 B. R., 529. Citing *Morgan v. Thornhill*, 5 B. R., 1 *Hall v. Allen*, 12 Wall., 452.

SALES—*Fraud*—35-39th Section.

1. In order to set aside a sale of goods within six months before proceedings in bankruptcy, it must be sufficiently proved that the buyer, when he purchased the goods had reasonable cause to believe the seller insolvent, that the sale was made in fraud of the bankrupt act, in the particulars mentioned in the 39th section; and that the sale was so much out of the usual course of business of the debtors as to raise a presumption of such fraud, which the explanation of the transaction given by the parties does not refute. Nor will such sale be set aside, where the intent of the bankrupt in making sale of his goods was to carry on his business and to pay his maturing obligations with a view of preventing insolvency: United States Circuit Court S. D. New York, *Sedgwick v. Lynch*, 8 B. R., 289.

2. Lucas purchased from Darby three months before bankruptcy of the latter a valuable piece of property for \$200,000. Suit was brought to avoid the sale under the 35th section. The proof showed that the action of Darby was not based upon the idea that he was in a bankrupt condition, but that he believed his property, if converted into money, would pay his debts. Sale was made in good faith and for an honest purpose. It is neither shown that Darby intended to defraud his creditors nor that Lucas aided him in doing so, even if he suspected his insolvency at the time, which is not proven:

*Held*, that, because it is for the interest of the community that every one should continue his business and avoid, if possible, going into bankruptcy, the privilege must not be denied a person, unable to command ready money to meet his debts as they fall due of making a fair disposition of his property in order to accomplish that object,

*Held further*, that, to bring a sale within the 35th section of the law, the fraudulent design of the bankrupt and the knowledge of it on the part of the vendor or reasonable cause to believe that it existed, must concur.

*Held further*, that the sale of realty by Darby was not out of the usual course of business within the meaning of the Bankrupt Act: United States Supreme Court. Davis, J., *Tiffany v. Lucas*, 8 B. R., 49.

SHERIFF—*Attachment*—*Costs*—*Lien*.

1. A Sheriff is entitled to the expenses incurred by him in keeping property of a bankrupt from the time of filing the petition until taken possession of by an assignee in bankruptcy on an attachment or mesne process, which by said proceedings, became and was in law dissolved. For the cost of the attachment proceedings, outside of that expended in the protection and care of the property delivered to the assignee, the Sheriff can only recover of the party employing him: *Seiber v. Hill*, 8 B. R., 239.

2. The District Court has not authority on a summary proceeding to take property from the hands of one who has lawfully acquired possession and claims an adverse interest to the assignee. Such proceedings must be by a regular suit at law or equity.

Where the District Court, at the petition of the assignee, issued a rule to show cause against the sheriff and a stranger, who had seized the goods ten days prior to the commencement of proceedings in bankruptcy to satisfy a lien for rent on a provisional warrant of seizure, and, upon the return of the rule, delivered the goods to the assignee and had them sold:

*Held*, the order was null and void and the assignee in bankruptcy acting under the order was a mere trespasser: United States Supreme Court, *Marshall v. Knor*, 8 B. R., 97.

3. When an execution under a final judgment has been levied by a sheriff prior to the commencement of proceedings in bankruptcy, the possession of the sheriff can not be disturbed by the assignee. The assignee is only entitled to claim the residue in the hands of the sheriff after satisfying the execution in his hands: United States Supreme Court, *Marshall v. Knor*, 8 B. R., 97.

#### SEPARATE ESTATE.—*Married Women.*

1. Unless the *lex domicilii* gives a married woman the power to contract, she will not be adjudged a bankrupt, where petition fails to show that the married woman was possessed of separate property. In *Indiana* a married woman, unless possessed of separate estate, is incapable of making a contract, (So in *Tennessee*.—REPORTER). *In re Rachel Goodman*, 8 B. R., 383.

2. In *Illinois*, where a married woman is incompetent to contract except as to separate estate the United States District Court *in re Kinkead*, 7 B. R., 439, sustained a petition in Bankruptcy against a *femme covert*, where the allegation of petition simply was that she and her husband were co-partners in trade.

3. In *New York*, where a married woman can be sued at law for contracts, a married woman, being a trader, may be declared a bankrupt: *Graham v. Stark*, 3 B. R., 92.

As to the decisions of the United States District Court for *Minnesota* on this point: see *In re Schlichter*, 2 N. B. R., 101.

4. A wife was possessed of a separate estate by an ante-nuptial settlement and paid the premiums for a policy on her life for the benefit of her husband out of her own separate estate for a year before the bankruptcy of her husband and for two years after the bankruptcy. At her death the assignee claimed the sum insured. Creditors claimed by the assignee that at the date of the bankruptcy the husband had a right of property in the policy (which it is contended is a *chose in action*) of such a nature that it vested in the assignee by virtue of section 14 of the Bankruptcy Act. The Court *held*, that the husband, at the time of his bankruptcy, had no such interest in the policy as to give the assignee the right to retain their proceeds as against the manifest intention of the wife.

*Held, further*, that the contract being a provision by one married part for the benefit of another and kept in force by the wife out of her separate estate, her equities must be regarded. The design of such charitable act for the benefit of a third party was not intended to be defeated by the Bankrupt Law. That the husband as against the assignee in bankruptcy was entitled to the proceeds of the policy. United States Circuit Court, Mo.: *Owen v. Merrim*, 8. B. R., 8.

#### SET-OFF.—*Trustee.*

A. held several policies of insurance against an insurance company as indemnity for loss by fire. By the Chicago fire he sustained heavy damages for which the company is liable. Company was put in bankruptcy by creditors. A. was one of the original stockholders of the company, and had paid in one instalment of the stock, while for the remainder he executed notes with security in accordance with

the charter of the company. For these notes he was indebted to the company. He also held, as director of the company, a portion of the money paid in for the stock and had, by acquiescence of the company, credited ten per cent. interest on said sum of money held by him:

*Held*, that A. has not the right in equity to set-off his losses on the policy against his liabilities for the payment of the stock of the company. The obligation of every person who subscribes and owes for stock, in case of its insolvency, is to pay what he owes for the benefit of the creditors: United States Circuit Court. Drummond, J., *Scammon v. Kimball*, 8 B. R., 337.

*Held*, a treasurer of a company is a trustee of the money of the company received by him as treasurer, and can not set-off against the amount due by him for such funds, a claim against the company of ordinary debt, as a loss, on a policy in an insurance company. *Ib.*

The defendant, a sheriff, had taken the property of a Bankrupt upon attachments issued to him out of the State Court, within four months preceeding the bankruptcy. The assignee brought in the United States District Court, an action for detinue against the sheriff for the goods attached and held by him under the writs held from the State Court. The sheriff denied the jurisdiction of the District Court and moved to dismiss, which motion was sustained. On appeal to the Circuit Court,

*Held*, 1. That the title to the goods attached vested in the assignee as soon as the assignment to him was executed and relates back to the commencement of proceedings, (14th section). 2. With this title he acquired a right of immediate possession. 3. Had this property been in the possession of a party who could not shelter himself behind the jurisdiction of a Court of Law, the United States District Court would have had jurisdiction of the case; but not so in the case of the sheriff who holds the property by virtue of an order from a court of competent jurisdiction. 4. The attachment is dissolved by the Bankrupt Law; but the assignee in bankruptcy must apply to the State Court to have the officer directed to turn over the property, and not to the Federal Court: *Johnson, assignee, v. Bishop, sheriff*, United States Circuit Court for Iowa, 8 B. R., 533

**SUBVIVING PARTNER—Administrator.**

Where one of the partners had died, and under the statute of the State, the partnership property is placed in the hands of the personal representative of the deceased partner to be administered, the Court in Bankruptcy will not, on a petition against the surviving partner, take the estate out of the hands of the administrator: *In re Doggett*, 8 B. R., 287.

**TRUSTEE—See Demand and Notice—Set-Off.**

**USURY—See Proof of Debt.**

# RECENT AMERICAN DECISIONS, IN FULL.

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SUPREME COURT OF CONNECTICUT.

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## THE STATE v. MICHAEL MORGAN.

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On the trial of a complaint for a violation of the statute against keeping a house, store, shop, saloon, or other place, in which it is reputed that spirituous or intoxicating liquors, ale or lager beer are kept for sale, without paying a license therefor, to warrant a conviction, it is necessary that the foundation of such reputation should be the fact that such liquors are so kept for sale. If the reputation has its origin from any other source, it is spurious and of no importance.

The accused was informed against by the Attorney for the State for New London county, for having on the 26th day of December, 1872, at the town of Norwich, in said county, kept a store, where it was then reputed spirituous liquors were kept for sale, in violation of the tenth section of the act of 1872, regulating the sale of such liquors. The case was tried at the January Term of the Superior Court, 1873, by the jury, and a verdict of guilty rendered. The accused moved for a new trial for error in the rulings and charge of the court. The case came before the Supreme Court, at the March Term of the same, and the questions of law, arising on the record, were argued by *Daniel Chadwick* (State Attorney) and *Geo. C. Ripley*, for the State, and by *John T. Wait* and *S. S. Thresher*, with whom was *T. Walter Swan*, for the defendant.

The facts are sufficiently stated in the opinion.

The opinion of the court was delivered by Park, J.: On the trial of this cause the counsel for the defendant requested the court to charge the jury, that the reputation of the place, kept by the accused, must be "well founded in fact." The court charged the jury "that the reputation must be an honest one, founded on the honest opinion of the neighborhood."

It is difficult to see any material distinction between the request that was made and the charge of the court. The charge is in substance, that the jury must be satisfied that the place kept by the defendant had the reputation in its vicinity of being a place where spirituous and intoxicating liquors, ale and lager beer were kept by the defendant, with the intent to sell the same.

The statute was intended to reach places where spirituous and intoxicating liquors, ale and lager beer, are kept for sale, and such places only. But the difficulty of proving, under the old law, that such liquors were, in fact, kept for sale, induced the legislature to pass the statute in question. The statute seems to presume, that if a place has the reputation of being one where spirituous and intoxicating liquors, ale and lager beer are kept for sale, it is a place where such liquors are in fact kept for sale, and, therefore, makes it criminal for a man to keep a place which has such reputation.

The foundation of the reputation, therefore, must be the fact, that such liquors are kept for sale. If it has its origin from any other source, it is spurious and of no importance. The *statutory* reputation grows out of the evidences that con-

vince men of ordinary sagacity, that such liquors are in fact kept in certain places for sale. It proceeds from persons passing and re-passing the establishments, and who see there, perhaps, all the appliances of drinking saloons. They see the intemperate loitering about the places. They see persons going there apparently sober, and who go away intoxicated. They see casks, decanters and jugs labelled with the various kinds of intoxicating liquors. They see beverages prepared and drank resembling such liquors; and, indeed, everything is discovered usually attending drinking saloons. Such persons communicate their knowledge to others, and, in a brief period of time, the places have the reputation of being establishments where such liquors are kept for sale. The reputation, therefore, is "founded in fact"—that is, it is based upon or grows out of the fact, that such liquors are kept for sale.

It is barely possible that the reputation of places may, in certain cases, do injustice to parties accused; that a place may have such reputation when no liquors are kept upon the premises; but, in such cases, if the fact should appear that there is no foundation for such reputation, the evidence would be conclusive that the reputation was either founded in malice or was owing to what some prior occupant of the premises had done; and, in either case, the defendant would not be liable.

But the statute makes the reputation of the establishment sufficient evidence in the first instance, that the statutory crime has been committed, which, in effect, is that such liquors are kept there for sale, and the burden of proof is thrown upon the defendant to show that the reputation has no foundation in fact.

In the present case, we see nothing tending to show that the reputation proved by the State was not founded in fact. The defendant did not attempt to show that it had its origin in malice, or was owing to what some prior occupant of the premises had done; and we think the charge of the court, requiring the jury to find "that the reputation was an honest one, founded on the honest opinion of the neighborhood," substantially complied with the request that was made; that is, must be founded in fact; for it was the honest opinion of the neighborhood, that the defendant kept such liquors in his establishment for sale, it must have had its origin in evidence that satisfied the minds of the observers, that such liquors were, *in fact*, kept for sale.

We do not advise a new trial.

UNITED STATES SUPREME COURT OCTOBER TERM, 1873.

*The New York Central Railroad Company, Plaintiff* }  
*in Error,* }  
 v.  
*Charles E. Lockwood.* }

*In error to the Circuit Court of the United States for the Southern District of New York.*

1. A common carrier can not lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

2. It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

3. These rules apply both to common carriers of goods and common carriers of passengers, and with especial force to the latter.

4. They apply to the case of a drover traveling on a stock train to look after his cattle, and having a free pass for that purpose.

Mr. Justice BRADLEY delivered the opinion of the Court.

The plaintiff in this case was a drover, injured while traveling on a stock train of the defendants, proceeding from Buffalo to Albany, and the suit was brought to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of his cattle, and to take all risk of injury to them and of personal injury to himself or whoever went with the cattle; and received what is called a drover's pass—certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of plaintiff's cattle at less than tariff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge to so charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did.

It is unnecessary to notice the subordinate points made, as we are of opinion that all the questions of fact were fairly left to the jury, and that the whole controversy depended on this main question of law.

It may be assumed *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers

for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, etc., led to the relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burdens with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract, may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least, null and void under certain circumstances.

In the case of sea-going vessels, Congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire, unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of ship and freight, where losses happened by the embezzlement or other act of the master, crew or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by State Legislatures. This seems to be the only important modification of previously-existing law on the subject, which in this country has been effected by legislative interference. And by this, it is seen, that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employees, and liable without limit for his own negligence.

It is true, that the first section of the above act relating to loss by fire has a proviso that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of Congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common-law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen or damaged," were held to be unavailing and void, as being against the policy of the law: (*Cole v. Goodwin*, 19 Wend., 357 *Gould v. Hill*, 2 Hill, 623).

But since the decision in the case of the *New Jersey Steam Navigation Co. v. Merchants' Bank*, by this court, in January Term, 1848, (6 How., 344,) it has been uniformly held, as well in the courts of New York as in the Federal courts, that a common carrier may, by special contract, limit his common-law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of the *New Jersey Steam Navigation Company v. Merchants' Bank*, above adverted to, grew out of the burning of the Steamer Lexington. Certain money belonging to the bank had been intrusted to Harnden's Express to be carried to Boston, and was on Board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose, and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk, and imposing it all upon the party: but the court would not presume that the parties intended to include the negligence of the carrier, or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried on the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability from negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. While we can not concede this, it is, nevertheless, due to the courts of that State to examine carefully the grounds of their decision and to give them the weight which they justly deserve. We think it will be found, however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate, for exemption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York, after the before mentioned decision in this court, involving the right of a carrier to limit his liability, was that of *Dorr v. The New Jersey Steam Navigation Company*, decided in 1850. (4 Sandf., 136.) This case also arose out of the burning of the Lexington, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage

and other accidents." Judge Campbell, delivering the opinion of the Court, says: "A common carrier has, in truth, two distinct liabilities—the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for immunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank*, in 6th Howard, and such we consider to be the law in the present case." And in *Stoddard v. Long Island R. Co.*, (5 Standf., 180), another express case, in which it was stipulated that the express company should be alone responsible for all losses, Judge Duer, for the court, says: "Conforming our decision to that of the Supreme of the United States, we must, therefore, hold: 1. That the liability of the defendant as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction, was valid in law 2. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence of themselves or their agents and servants. 3. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases, (*Parsons v. Monteath*, 13 Barb., 353; *Moore v. Evans*, 14 Barb., 524;) all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not till 1858, in the case of *Wells v. New York Cent. R. Co.*, 26 Barb., 635, that the Supreme Court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger traveling on a free ticket, which exempted the company from liability. In 1862, the Court of Appeals, by a majority, affirmed this judgment, (42 N. Y., 181,) and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the traveling public. *Perkins v. N. Y. Cent. R. Co.*, 24 N. Y., 196, was also the case of a free passenger, with a similar ticket, and the court held that the indorsement exempted the company from all kinds of negligence of its agents, gross, as well as ordinary—that there is, in truth, no practical distinction in the degrees of negligence.

The next cases of importance that arose in the New York courts were those of *drover's passes*, in which the passenger took all responsibility of injury to himself and stock. The first was that of *Smith v. N. Y. Cent. R. Co.*, 29 Barb., 132, decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car which caused it to jump the track. The Supreme Court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the Judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part."

The Judge added that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But, to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extra judicial. The judgment itself was affirmed by the Court of Appeals in 1862, by a vote of five Judges to three. (24 N. Y., 222). Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the State; yet the State has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not alone the party who is carried. Judge Sutherland agreed in substance with Judge Wright. Two other Judges held that if the party injured had been a gratuitous passenger the company would have been discharged, but in their view he was not a gratuitous passenger. One Judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality, it included all risks.

The next case, *Bissell v. The N. Y. Cent. R. Co.*, 29 Barb., 602, first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "whether of negligence by their agents or otherwise," for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The Supreme Court held that gross negligence (whether of servants or principal) can not be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the Court of Appeals, four Judges against three (22 N. Y. Rep., 442); Judge Smith, who concurred in the judgments below, having, in the meantime, changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by *Weils v. The Central Railroad Co.*; but whether so, or not, the contract was founded on a valid consideration and the passenger was bound by it even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against the conclusions reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of *Poucher v. N. Y. Cent. R. Co.*, 49 N. Y., 263, is in all essential respects, a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other State Courts which, by dicta or decision, either favor or follow, more or less closely, the decisions in New York. A reference to the principal of these in the margin, is all that is necessary here.<sup>1</sup>

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the Federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that State. And in deciding a case which involves a question of such importance to the whole country; a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge Davis, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts."<sup>2</sup>

We now proceed to notice some cases decided in other States, in which a different view of the subject is taken.

In Pennsylvania, it is settled by a long course of decisions, that a common carrier can not, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or malfeasance, or that of his servants and agents. *Luing v. Colder* 8 Barr, 479; *Camden & Amboy R. Co. v. Baldauf*, 16 Penn., 67; *Golday v. Penn., R. Co.*, 30 Penn., 342; *Powell v. Penn. R. Co.*, 32 Penn., 414; *Penn. R. Co. v. Henderson*, 51 Penn., 315; *Farnham v. Camden & Amboy R. Co.*, 55 Penn., 53; *Express Co. v. Sands*, do., 140, *Empire Trans. Co. v. Wamsutter Oil Co.*, 63 Penn., 14. "The doctrine is firmly settled," says Chief Justice Thompson, in *Farnham v. C. & A. R. Co.*, "that a common carrier can not limit his liability so as to cover his own or his servant's negligence." (55 Penn., 62.) This liability is affirmed both when the exemption stipulated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In *Penn. R. Co. v. Henderson*, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents, or otherwise. The court, Judge Read delivering the opinion, after a careful review of the Pennsylvania decisions says: "This indorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may be occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

<sup>1</sup> *Ashmore v. Penn. R. Co.*, 4 Dutch., 180; *Kinney v. Cent. R. Co.*, 3 Vroom, 407; *Hale v. N. J.*, 9 St. Nav. Co., 15 Conn., 539; *Peck v. Weeks*, 34 Conn., 145; *Lawrence v. N. Y. R. Co.*, 35 Conn., 68; *Kimball v. Rutland R. Co.*, 26 Vt., 247; *Mann v. Birchard*, 40 Vt., 332; *Adams Ex. Co. v. Haines*, 42 Ill., 89; *Do.*, 458; *Ill. Cent. R. Co. v. Adams Exp. Co.*, do., 474; *Hawkins v. Grt. West. R. Co.*, 17 Mich., 57; *S. C.*, 18 Mich., 427; *Balt. & O. R. Co. v. Brady*, 32 Md., 833; 25 Md., 128; *Laverny v. Union Trans. Co.*, 42 Mo., 270.

<sup>2</sup> *Stinson v. N. Y. Central R. Co.*, 32 N. Y. Rep., 837.

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence, or that of his servants. (*Jones v. Voorhees*, 10 Ohio, 145; *Davidson v. Graham*, 2 Ohio St. R., 131; *Graham v. Davis*, 4 Ohio St. 362; *Wilson v. Hamilton*, do., 722; *Welsh v. Pittsburg, Ft. W. & Chicago R. Co.*, 10 do. 75; *Cleveland R. v. Curran*, 19 do., 1; *Cincinnati, etc. R., v. Pontius*, do., 221; *Knott v. Erie R.*, do., 260.) In *Davidson v. Graham*, the court, after conceding the right of the carrier to make special contracts to a certain extent, says: "He can not, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. \* \* \* And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In *Welsh v. Pittsb. Ft. W. & Chicago R.*, the court say: "In this State, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the State." From these facts, the Court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently say: "This doctrine, when applied to a corporation which can only act through its agents and servants, would secure complete immunity for the neglect of every duty." (pp. 75-76.) And in relation to a drover's pass, substantially the same as that in the present case, the same court, in *Cleveland, etc. R. v. Curran*, 19 Ohio St. 1, held: 1. That the holder was not a gratuitous passenger. 2. That the contract constituted no defense against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of *Bissell v. The New York Central R.*, 25 N. Y., 442; and of *Penn. R. v. Henderson*, 51 Penn. St. R., 315; and expresses its concurrence in the Pennsylvania decision. (pp. 12-13.) This was in December term, 1869.

The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire, heat, frost, etc., (*Fillbrow v. Grand Trunk R. Co.*, 55 Me., 462), yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. "The very great danger," say the court, "to be anticipated by permitting them" [common carriers] "to enter into contracts to be exempt from losses occasion-

ed by misconduct or negligence, can scarcely be overestimated. It would remove the principal safeguard for the preservation of life and property in such conveyances." (*Sager v. Portsmouth*, 31 Me., 228, 238).

To the same purport it was held in Massachusetts in the late case of *School District v. Boston, etc., Railroad Co.* (102 Mass., 552), where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted, to exempt the defendants from liability for injuries by their own negligence." (p. 556).

To the same purport, likewise, are many other decisions of the State courts, as may be seen by referring to the cases cited in the margin, some of which were argued with great force and are worthy of attentive perusal, but, for want of room, can only be referred to here.<sup>1</sup>

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in accordance with the early English authorities. St. Germain in *The Doctor and Student*, Dail. 2, c. 38, pointedly says of the common carrier: "If he would per case refuse to carry it" [articles delivered for carriage] "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason, and against good manners, and so it is in all other cases like."

A century later this passage is quoted by Attorney-General Noy in his book of *Maxims* as unquestioned law. (Noy's Max., 92). And so the law undoubtedly stood in England until comparatively a very recent period. Serjeant Stevens, in his *Commentaries*, vol. 2, p. 135, after stating that a common carrier's liability might, at common law, be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods unless entered and paid for according to value. The courts held that this was a reasonable condition, and, if brought home to the owner, amounted to a special contract valid in law. But it was also held that it could not exonerate the carrier if a loss occurred by his actual malfeasance or gross negligence. Or, as Starkie says, "proof of a direct malfeasance or gross negligence is in effect an answer to proof of notice."—(*Evidence*, vol. 2, p. 205, 6th Am. ed.) But the term "gross negligence" was so vague and uncertain that it came to represent every instance of actual negligence of the carrier or his servant—or ordinary negligence in the accustomed mode of speaking, (*Hinton v. Dibbon*, 2 A. & E. N. Ser., 649; *Wild v. Pickford*, 8 M. & W., 460). Justice Story, in his work on *Bailments*, originally published in 1832, says that it is now held that, in cases of such notices the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence, or, in other words, the carrier is bound to ordinary diligence. (*Story on Bailments*, § 571).

In estimating the effect of these decisions it must be remembered that, in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are, therefore, directly in point.

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<sup>1</sup> *Indianapolis R. v. Allen*, 31 Ind., 394; *Mich. South. R. v. Heaton*, 31 Ind., 397, note; *Flinn v. Phil. Wm. & Balt. R.*, 1 Houston's Del. R., 472; *Orndorff v. Adams Exp. Co.*, 3 Bush. (Ky.) R., 104; *Schiller v. Hilliard & Brooks*, 2 Rich., (So. Car.), 286; *Berry v. Cooper*, 28 Ga., 543; *Steele v. Townsend*, 37 Ala., 247; *Southern Express Co. v. Crook*, 44 Ala., 468; *Whitesides v. Thurlkill*, 12 Sm. & M., 308; *Southern Express Co. v. Moon*, 39 Miss., 322; *N. O. Mutual Ins. Co. v. Railroad Co.*, 22 La. Ann., 302.

In 1863, in the great case of *Peck v. The North Staffordshire Railway Co.*, 10 House of Lords Cases, 473, Mr. Justice Blackburn, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants, and, as it seems to me, the reason why the legislature intervened in the railway and canal traffic act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language), 'to evade altogether the salutary policy of the common law.'"

This quotation is sufficient to show the state of the law in England at the time of the publication of Judge Story's work; and it proves that, at that time, common carriers could not stipulate for immunity for their own or their servant's negligence. But in the case of *Carr v. Lancashire R. Co.*, (7 Excheq. R., 707), and other cases decided whilst the change of opinion alluded to by Justice Blackburn was going on, (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the railway and canal traffic act, declaring that railway and canal companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable. (1 Fisher's Dig., 1466). Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of *The N. J. Steam. Nav. Co. v. Merchants' Bank*, 6 How., 383. On the precise point now under consideration, Justice Nelson said: "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

As to the carriers of passengers, Mr. Justice Grier, in the case of *Philadelphia and Reading R. v. Derby*, 14 How., 486, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such a transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the President to examine its condition; and it was contended in argument, that as to him, nothing but "gross negligence" would make the company liable. In the subsequent case of *The Steamboat New World v. King*, 16 How., 469, which was also the case of a free passenger carried on a steamboat and injured by the explosion of the boiler, Curtis, Justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: "We desire to be understood to re-affirm that doctrine, as resting not only on public policy but on sound principles of law." (p. 474.)

In *York Company v. Central Railroad*, 3 Wall., 113, the court, after conceding that the responsibility imposed on the carrier of goods by the common law, may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." In the case of *Walker v. The Transportation Company*, decided at the same term (3 Wall., 150), it is true, the owner of a vessel destroyed by fire on the lakes, was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in *Express Co. v. Kountze Brothers*, 8 Wall., 342, where the carriers were sued for the loss of gold dust delivered to them on a bill of lading, excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men, (one of the excepted risks) because they negligently and needlessly took a route which was exposed to such incursions. The judge, at the trial, charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law. (p. 353.)

Some of the above citations are only expressions of opinion, it is true; but they are the expressions of judges whose opinions are entitled to much weight; and the last cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of State courts before cited, they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of any superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?

On this point there are several authorities which support our view, some of which are noted in the margin.<sup>1</sup>

A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York city and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in *Dorr v. The N. J. Steam Nav. Co.*, 1 Kern., 485, the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

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<sup>1</sup>*Davidson v. Graham*, 2 Ohio St., 131; *Graham v. Davis & Co.*, 4 Ohio St., 362; *Swindler v. Hilliard*, 2 Rich., 286; *Baker v. Brinson*, 9 Rich., 201; *Steel v. Townsend*, 37 Ala., 247.

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of \$14 for every animal carried, instead of the usual charge of \$70 for a car load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals become injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although

modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute called the railway and canal traffic act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid, so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject the remarks of Chief Justice Redfield, in his recent collection of *American Railway Cases*, seem to us eminently just. "It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they can not, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and, therefore, not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities.<sup>1</sup> If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."<sup>2</sup> Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature.<sup>3</sup> But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are—

*First.* That a common carrier can not lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

*Secondly.* That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

*Thirdly.* That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

*Fourthly.* That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

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<sup>1</sup> 1 Smith's Lead. Cases, 6th Amer. ed.; Story on Bailments, §571; Wyld v. Pickford, 7 M. & W., 460; Hinton v. Dibbin, 9 Q. B., 661; Wilson v. Brett, 11 M. & W., 115; Beal v. South Devon R. Co., 3 Hurlst. & Colt., 837; L. R., 1 C. B., 600; 14 How., 486; 16 How., 474.

<sup>2</sup> Art. 1382.

<sup>3</sup> Vol. 6, p. 243.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

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SUPREME COURT OF TENNESSEE—OCTOBER TERM, 1873, AT JACKSON.

*Abraham Barnett v. L. Oppenheimer.*

When a judgment from another State is sought to be enforced in the courts of this State, it is competent to our tribunals, upon the plea of *nul tiel record*, to determine whether the court rendering the judgment sought to be enforced had jurisdiction of the person against whom the judgment is rendered, and of the subject matter of the suit.

This is an action of debt instituted in the Law Court of Memphis upon the record of a judgment of a circuit court of Mississippi. Defendant below (Barnett) pleaded *nul tiel record* and payment. After one verdict and judgment in favor of defendant, a new trial was granted, which resulted in a verdict in favor of plaintiff, and defendant has appealed in error to this court. The argument of counsel here has been mainly addressed to the question of the validity of the record of the judgment, which is the foundation of this suit. For plaintiff in error it is insisted that the record sued on shows upon its face that defendant had no notice, actual or constructive, of the existence of the suit against him, and that this court must hold the judgment void for want of jurisdiction of the person. While, on the other hand, it is insisted that the judgment, having been rendered by a court of competent jurisdiction in such cases, its jurisdiction can no more be inquired into by the courts of this State than the correctness of the judgment upon the merits. The statutes of Mississippi require that original process shall be served personally on the defendant, if to be found, and a true copy thereof delivered to him. If the defendant cannot be found, such process may be served by leaving such copy at his usual place of abode, with his wife, or some free white person above the age of sixteen years, then and there being a member of his family, etc. The record in question shows that on the 18th of May, 1860, a declaration of complaint was filed in the office of the clerk of the Circuit Court of Sunflower county, Mississippi, and thereupon a summons was issued, which was returned indorsed as follows: "Received May 28, 1860. Executed this writ May 30, 1860, by leaving a true copy thereof with ———, a free white person, found at his usual place of residence in this county, defendant not being found. Eli Waites, sheriff, by G. H. Bryant, special deputy." Then follows at the December Term, 1860, a judgment by default, for \$1050.08. From the sheriff's return, it is manifest that the personal service of the writ was not effected, and we think it equally clear that no constructive notice was given, nor does the record anywhere recite that the defendant appeared, or that he was summoned to appear. It is not a case of defective service of process, but one of a total want of service, a distinction clearly recognized in the case of *Harrington v. Wofford*, 46 Miss., R. 41, where it is said, "There is a very clear and obvious distinction between a total want of service of process, and a defective service, as to their effect in judicial proceedings."

In the one case the defendant has no notice at all of the suit or proceedings against him. The judgment or decree in such cases, it is conceded, is *coram non judice* and void, upon the principles of law and justice. In the other case the defective service of process gives the defendant actual notice of the suit or proceedings against him, and the judgment or decree in such case, although erroneous, would be valid, until reversed by a direct proceeding in an appellate jurisdiction, and its validity can not be called in question." The same distinction is recognized between a void and voidable judgment, or an irregular or defective service and no service at all, in same book, p. 675, and in 41 Miss., 562. In the last named case Judge Ellett, delivering the opinion of the court, says, "Where judgment by default is taken upon a return which purports to show that the process has been *actually executed*, such judgment is valid and binding whenever it comes collaterally in question, although the defendant might reverse it upon a writ of error, on the ground of the insufficiency of the return." In the case under consideration, there was no personal service of notice, nor any constructive notice, so that according to the case in 46 Miss., 41, the judgment rendered in Mississippi is void there, and this is so whether the defendant was or was not a resident or inhabitant of that State at the time of the rendition of the judgment. The constitution of the United States declares "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." (Article four, section one).

Pursuant to this authority, Congress enacted "that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." [Act of May 26, 1790.] If, therefore, the judgment in this case is a valid judgment, which the court in Mississippi had the jurisdiction to pronounce, it is equally valid and binding here. But it is insisted by the counsel for the defendant in error that the question of jurisdiction of the person of the defendant is just as legitimate for the determination of the court rendering the judgment sued on, as any other question arising in the cause, and when determined, as it necessarily is in the rendition of the judgment, it is conclusive, and cannot be inquired into in a collateral proceeding. Authorities have been cited which fully sustain the proposition of the counsel. In the notes of the two cases of *Mills v. Duryee*, and *McElmoyle v. Cohen*, [2 Am. Lead. Cases.] Many cases in the United States and State courts are cited, which show conflict and differences in the holdings of those courts. While many of them fully sustain the proposition of the counsel for defendant in error, as before stated, other authorities equally as decisively announce the doctrine that, upon the plea of *nul tiel record*, the court should inspect the record, and determine for itself whether the court trying the cause had jurisdiction of the person of the defendant. If defendant had no notice, actual or constructive, of the proceedings against him, it would be alike contrary to natural justice and to law to hold him liable. A judgment pronounced against a person, under such circumstances is null and void, and is so declared by the courts of Mississippi, and have been so declared repeatedly by our own courts. To hold, therefore, that the courts of this State may not declare a judgment of Mississippi void, which the adjudications of that State declare void, would be to give greater faith and credit to the proceedings of the courts of that State by our own courts than her own courts would give. The plea of *nul tiel record* properly raises the question of the existence of the record sued on, and this plea is triable by the court; and when, on inspection of the record, it appears that the party

sued in this State was not before the court at the trial, and that the court never had jurisdiction of his person, he having had no notice of the suit nor opportunity to defend it, it is in fact no record as to him, and he is not bound by the judgment therein rendered. Whether the court had jurisdiction of the person may be tried and determined by the court before whom the suit upon the record is brought. And this power, which has been asserted and exercised by our own courts, is not in violation of the act of Congress of 1790. In Sto. on C. L., 609, it is said that "judgment in State courts have the same force and effect in other States as in the State in which they are rendered," and adds: "This does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered." To the same effect are the cases in 9 Mass., 462, 14 Howard (U. S.), *Harris v. Hardeman*, p. 337, where numerous cases are referred to and reviewed. In the case of *Moren v. Killibrew*, (2 Yerg. 376), Judge Whyte delivering the opinion of the court, declares that void judgments have no operation whatever, while voidable judgments are valid until reversed; and, while disclaiming any right to determine whether the court of a sister State had rendered a correct or erroneous judgment upon the subject matter before it, very clearly asserts the power of a court of this State, when called upon to enforce the judgment of the court of another State," to inquire into the jurisdiction of the court rendering the judgment sought to be enforced. These authorities and others which might be cited, fully sustain what we regard as the safer and more just rule upon the subject, i. e., that when a judgment from another State is sought to be enforced in the courts of this State, it is competent to our tribunals upon the plea of *nul tiel record* to determine whether the court rendering the judgment sought to be enforced had jurisdiction of the person against whom the judgment is rendered, and of the subject matter of the suit. It results that the judgment of the law court at Memphis, was erroneous, and must be reversed, and this court, rendering here such a judgment upon the plea of *nul tiel record* as the court below should have rendered, sustains the plea and dismisses the suit at costs of plaintiff below. The judgment of the court in favor of defendant upon his plea of *nul tiel record* is decisive of the case, and makes it unnecessary to remand the cause for a trial upon what is now the immaterial plea of payment.

DEADERICK, J.

## BOOK NOTICES.

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*The Code of the State of Georgia.* Prepared by R. H. CLARK, T. R. R. COBB and D. IRWIN. Revised and corrected by DAVID IRWIN. Second edition. Revised, corrected, and annotated by DAVID IRWIN, GEORGE N. LESTER and WALTER B. HILL. Macon, Georgia: J. W. Burke & Co., publishers, 1873.

The present edition of the above work has been *revised* by the insertion of all acts of the General Assembly of Georgia up to date, and by striking out such as have been repealed, with a reference to the repealing act; and it has been *annotated* with citations of three sorts. First, references in the margin to the statutes from which provisions in the Code have been derived. These enable the practitioner to trace all the previous legislation on any subject, "the old law, the mischief and the remedy," and to ascertain at what time any law of the Code took effect. The statutes referred to extend from the year seventeen hundred and fifty-five to the present time. Second, references, also in the margin, to cognate or collateral sections. It would be impossible so to arrange the contents of a Code that all the law pertaining to any subject would be found under the heading indicating that subject. Hence, there are in different parts of the work sections which bear upon the same point, illustrate each other, and which must be construed *in pari materia*. These marginal citations furnish a convenient means of comparison in such cases. Third, references to the decisions of the Supreme Court of Georgia from 1 Kelly up to the present time. These are not quoted in full, but are abbreviated, and in some instances where the propositions are complicated, only the subject or predicate is stated—this being sufficient to indicate the point to which the decisions relate. Those decisions which bear particularly upon any section are placed immediately after such section, while those which relate generally to the subject of any article or chapter are placed at the end of such article or chapter.

The volume (with appendices giving the State constitution and the rules of Court, which are also annotated) is thus seen to be a complete embodiment of Georgia law. The annotations are a digest of all the legislation previous to the adoption of the Code (1861) and of all the decisions of the Supreme Court of the State.

The typographical execution of the work is highly creditable to Messrs. Burke & Co. The printing and the binding are not surpassed by Northern publishers.

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*The Spirit of Laws.* By M. DE SECONDAT. BARON DEMONTESQUIEU. Translated from the French by THOMAS NUGENT, LL.D. A new edition, carefully revised and compared with the best Paris edition, to which are prefixed a Memoir of the Life and Writings of the Author, and an Analysis of the work, by M. D'ALEMBERT. In two volumes. Price \$6.00. Published by Messrs. Robert Clarke & Co., Cincinnati.

The publishers deserve credit for the handsome dress in which they have presented this celebrated work. The paper is thick and rich; the type large and clear, and the binding solid and quite handsome.

Anything like a synoptical criticism of the work itself is, at present, wholly out of our power. Perhaps, no analysis of its purpose and spirit could be condensed into fewer words than those of M. D'Alembert, and that would consume fully fourteen of our pages. For this, as also for other reasons, we feel constrained (inconsistent with the character of a critic though it may appear) to grant the favor asked by its author, that is, not to judge by a few hour's reading of the labor of twenty years. We feel all the more disposed to this, moreover, as our readers will find in this and succeeding numbers of the REVIEW, under the head of "Modern Theories of Government," frequent references to this work, and from a much abler pen than ours.

We quote, however, the notice in full given by our contemporary, the Albany Law Journal.

"Montesquieu," said Mr. Wheaton in his Law of Nations, "still merits and enjoys the reputation of having invented the grand idea of connecting jurisprudence with history and philosophy in such a manner as to render them all subservient to their mutual illustration." His "Spirit of Laws" is, in the estimation of able men, his greatest work, as it was the work of the best years of his life, although there are a few who give the preference to his *Considerations sur les Causes de la Grandeur et de la Decadence des Romains*.

The title "Spirit of Laws" or *Esprit des Loix*, was not happily chosen to express the subject and object of the work; what was meant was the causes from which laws have arisen—the *Legis Legum*, to which they were owing and from which they sprung. Its object was the development of the general principles which run through the jurisprudence and institutions of all nations. It was a famous saying of Madame de Defland that it was not the *Esprit des Loix* Montesquieu had written but *Esprit sur les Loix*. The work was published in 1748, and its success was at once great. Before two years had elapsed it had gone through twenty-two editions and been translated into most of the European languages, a success seldom equaled in a work of profound and original thought. In this connection it is interesting to note the history of the writer's mind during the progress of the work. So distrustful was he of its success even after the vast labor he had employed in its composition that he sent the manuscript to Helvetius, a friend, on whose judgment he could rely. Helvetius concluded that Montesquieu's reputation would be ruined by the publication of the work. In this opinion Saurin, another friend and critic, joined. It afflicted them to have the brilliant author of the *Lettres Personnes* "sink into a mere Legist, a dull commentator on pandects and statutes." Montesquieu, however, disregarded their advice and sent his manuscript to the printer, with the motto, *Prolem sine Matre Creatam*.

The central idea of the work is that human laws and institutions were the effect, rather than the cause of national character—that they arose, in every country, from something peculiar in the race—its type or character—the climate, employment or mode of earning subsistence—the physical circumstances in which it was placed. The customs and institutions which, having been framed by necessity or the dictates of experience, according to the circumstances in which each people were placed, were best adapted to their temper and situation. True wisdom consisted not in altering but following out the spirit of existing laws and customs. To use his own words: "No nation ever yet rose to lasting greatness but from institutions in con-

formity to its spirit." No calamity was so great as seeking to force upon one race or people the institutions which have arisen among and are adapted to another.

These principles are entirely at variance with those notions which have been current among Americans. With our enthusiastic democracy, institutions have been everything; national character, descent, employment, or physical circumstances, nothing. All mankind would be the same if they only enjoyed the same liberty, laws and institutions. And we have waited anxiously and hopefully to behold a republic similar to our own, erected upon the ruins of every monarchy in Europe. The events of the last few years, however, have tended to vindicate Montesquieu's theory, and to spread a doubt among thinking men, whether the American notion was well founded.

The style of Montesquieu is condensed, nervous and epigrammatic, rather than eloquent or forcible; but his works abound in brilliant passages, many of which has become familiar as household words from one end of the world to the other.

To the students of law we most earnestly commend the reading of the *Spirit of Laws*. They will find it an invaluable treasure of original thought and profound views, of luminous observation and deep reflection, of philosophic observation and just generalization. In the language of the translators's dedication, "Whoever finds pleasure in perusing the *Spirit of Laws*, must be deemed to have greatly improved in the study of politics and jurisprudence."

Messrs. Clark & Co., are entitled to great credit for the elegant edition they have given us. The translation is that of Dr. Nugent, made during the life-time of Montesquieu, and especially approved by him, while the letter-press and paper are all that one could desire.

*Reports of Cases Argued and Determined in the Supreme Court of Alabama, at the January Term, 1872.* By THOMAS G. JONES, State Reporter. Vol. XLVII. For sale by Joel White, Bookseller, etc., Montgomery, Alabama.

In the preparation of this volume the Reporter has displayed skill and care. The Index is unexceptionable, and much superior to very many that we lately have had to examine in other State Reports. The Reporter has contented himself with extracting from the opinions the legal principles raised and decided, and classifying them under appropriate headings. We believe this to be, for the purposes of an Index, greatly the better plan, than that of accompanying these principles with a statement of facts out of which they are extracted. Unquestionably, this latter plan, for the purposes of a Digest, would excel, but we greatly prefer the former for an Index, for the reason that the Index is intended merely for the purpose of suggesting the character of the cases to which it refers. Many of the Indices to our State Reports would answer their purpose much better if only one half the space were occupied.

We notice several excellent features in this volume, for instance, the number of the volume is printed at the head of each alternate page, thus frequently saving one the trouble of referring to its back. This may be deemed a little matter, but nevertheless proves that the Reporter has been in its preparation both careful and thoughtful. We find several cases suggesting somewhat novel, and perhaps, unadjudicated points. We quote the syllabus, in the case of *Fields v. The State*: "On a trial on an indictment for murder, under our statutes, the jury are not only required to pass upon

the guilt or innocence of the accused, but also, on conviction to find by their verdict whether it be murder in the first or second degree, and determine the character, the extent, and the severity of the punishment to be inflicted. Evidence, therefore, of the general bad character of the deceased as a turbulent, blood-thirsty, revengeful, dangerous man, is competent, relevant, and proper evidence, (although, under the circumstances of the particular case, it may not be sufficient to reduce the offence from murder to manslaughter), to enable the jury to determine the degree of the offence, and the character and measure of the punishment.

2. Where the general good character of the accused as a peaceable man is proved, the following is a correct charge, to-wit: "If the prisoner has proved a good character as a man of peace, the law says that such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed, but for such good character; and if asked in writing, it is error to refuse it."

We find also on page 104 the case of *Offut et. al. v. Scott*, involving questions relating to the law of Partnership, which will prove of interest to the profession, and the syllabus to which we also subjoin:

1. "Real estate purchased by a partnership, for partnership purposes, and paid for with partnership funds, as to the creditors of the firm is, in equity, treated as personal property, and will, if necessary, be subjected to the payment of their debts, whether the title be conveyed to the partners by name, or to one of them, or to a third person.

2. In case of the death of one partner, the survivor is a trustee for all persons interested in the partnership, for the creditors of the firm, for the representatives of the deceased partner or his heirs and for himself; and for the purpose of closing up the business of the firm, he is invested with the exclusive right of possession and management of the whole partnership property and business. His trust being to wind up the concern, his powers are commensurate with the trust; hence he may collect, compromise, or otherwise arrange all the debts of the firm, and his receipts, payments and doings generally, in that behalf, are valid, if honestly done, and within the fair scope and purposes of the trust, and until the debts of the firm are paid, neither the personal representatives nor the heirs of the deceased partner have any beneficial interest in the partnership property.

3. When a partnership is dissolved by the death of one partner, the only remedy at law against the firm, by the creditors of the firm, is by suit against the survivor, and when a creditor has exhausted his remedy at law against the firm, by a suit against the survivor prosecuted to a return of an execution "no property found," he may then file his bill in equity to subject the real estate of the partnership to the payment of his debts and this, whether the possession be in the surviving partner, the personal representative, or the heirs of the deceased partner, or any other person who is not a *bona fide* purchaser for valuable consideration and without notice.

4. If goods shipped and consigned to a firm doing a commission business to be sold on account of the shipper, are received, but before they are sold one of the partners dies, the survivor may sell such goods, and in such case, the claim of the shipper on account of such sale is properly against the firm, and not against the survivor individually.

5. A variance between the statements of the bill and the proof, if not of such a character as to operate as a surprise to the defendants, and the defendants do not appear to be thereby injured, should generally be held to be immaterial.

6. If a surviving partner sell and convey his interest in the real estate belonging to the partnership to a *bona fide* purchaser for valuable consideration, without notice, be-

fore a creditor of the firm has acquired a lien on the same by bill filed to subject it to the payment of his debt, the purchaser will hold it against the general equity of the creditors to have it appropriated to the payment of the partnership debts."

The volume, in its mechanical execution and outfit, reflects much credit upon the printers and binders.

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Through the house of Messrs. Baker, Voorhis & Co., of New York, we have received a copy of the second edition of *Townshend on Slander and Libel*.

The investigation given it since our notice of its receipt, in the last number of the REVIEW, has shown us, we regret to say, that we were then a little hasty in our opinion of its merits. A great portion of the book we think, is much too elementary in its character and containing by far too many propositions, not at all questioned, but on the contrary of very great simplicity; and definitions all along well understood by the profession. The space occupied by them is of disadvantage to the book, as a convenient one for use, and the time necessarily consumed in reading them, dulls the edge of interest that would otherwise be felt; so that the curiosity to pursue them to our author's conclusions practically ceases. Many of the distinctions drawn and definitions given, however, are in themselves useful and clear, and well reward one for his patience in arriving at them.

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*Wharton and Stille's Medical Jurisprudence.* Third Edition. Vol. II. Philadelphia: Kay & Brother.

This volume is divided into nine books. Book 2 treats of Questions relative to the Fœtus and new-born Child. Book 3, of Questions arising out of the difference of Sex. Book 4, of Questions relative to Identity. Book 5, of Questions relative to the cause of Death. Book 6, of Survivorship. Book 7, of Medical Malpractice. Book 8, of Legal Relations of Homicide, Feticide, and Infanticide. Book 9, of Legal Relations of Identity. Book 10, of Legal Relations of Experts.

To the student the work will be found exceedingly interesting, and to the active practitioner, in the law and criminal courts, invaluable. Like all the publications of this firm that have come under our notice, the typographical execution is admirable.

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*Digest of Fire Insurance Decisions, in the Courts of Great Britain and North America:* By H. A. LITTLETON and J. S. BLATCHLEY, with the additional Notes to the Second Edition, by STEPHEN G. CLARKE. Third Edition, revised and enlarged, by CLEMENT BATES, of the Cincinnati Bar. New York: Baker, Voorhis & Co., Publishers.

From the examination we have given this work we are satisfied that the editors have displayed care and skill in its preparation, and that it will be found worthy of a place in every practitioner's library.

In the preface to the first edition it is stated that the editors have given abstracts of 930 cases, which are embodied in 1,525 sections, and the present edition contains an addition of 262 cases, chiefly covering the period beginning with 1868 and ending with June, 1873, but occasionally dating as far back as 1845.

The type is large and clear, and the binding solid and handsomely finished.

*A Medico-Legal Treatise on Malpractice and Medical Evidence, comprising the Elements of Medical Jurisprudence:* By JOHN J. ELWELL, M. D., member of the Cleveland Bar, Professor in Ohio State and Union Law College and Western Reserve Medical College, etc. Third Edition—Revised and Enlarged. New York: Baker, Voorhis & Co., Publishers. For sale by Ingham, Clarke & Co., Cleveland, O.

This work certainly possesses a very considerable advantage over other works of a similar character in having been written by one uniting in himself both lawyer and physician, and for this reason, perhaps, is more perfect in its plan and accurate in its details than any other we have on the same subject.

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*A Digest of the Decisions of the Federal Courts from the Organization of the Government to the Present Time:* By FREDERICH C. BRIGHTLY, Esq. Vol. II, Second Edition.

The publication of the first volume of this work in 1868, supplied a desideratum long felt in the profession and very soon established itself as a work of merit and reliability.

The first edition of the second volume was gotten out in 1870, and soon exhausted. The volume before us belongs to the second edition and brings the digest down to, and including a portion of the year 1873.

It would be useless for us to comment on the merits of the author's work composing the two volumes. With the exception of the new material in the present volume the work has been before the profession long enough for them to form a just estimate of its merits and demerits, which estimate can certainly, not be anything else than favorable to the learned author, and his continuation of the work down to the present time places the profession under renewed obligations to him.

The general make up of the book reflects credit upon its publishers, Messrs. Kay & Bro., Philadelphia. The typography is unexceptional and the binding excellent.

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*Fisher's Patent Reports: A collection of Reports of cases arising under Letters Patent for Inventions, decided in the Supreme Courts of the United States, from 1850 to the present time.* By WILLIAM FISHER. Robert Clarke & Co., publishers, Cincinnati, Ohio.

This is a book of seven hundred and twenty-eight pages, printed in the best style of the art, and substantially bound in law calf. It is the intention of the learned author to collect into two or more volumes all the cases relating to patents contained in the numerous volumes of the reports of the Supreme and Circuit Courts of the United States, since 1850. The volume before us contains a carefully prepared and complete Index and table of cases, which are a great convenience to the profession in this age of multitudinous books. A limited edition will be published. Price 15.00 per volume. The inventive genius of the people of the South is now being rapidly developed, and as a consequence, there will be an increased demand by the profession in this section, for reports of patent cases already decided.

OUR thanks are due to Hon. John M. Shirley, Reporter of New Hampshire, for advance sheets of 52 N. H. Mr. Shirley displays remarkable aptitude for the duties of State Reporter. We are sure he has no superior, if indeed an equal, in extracting from voluminous opinions the points really raised and decided, and expressing them in terse, accurate language. The opinions of the Supreme Court of New Hampshire are exceedingly valuable, especially because of the exhaustive citation of authorities with which every point, properly brought before it, is either supported or condemned.

If other State Reporters would do us the like great favor of sending us advance sheets of their forthcoming reports, it would be the means, perhaps, of bringing their own merits, and the merits of their State adjudications more prominently to the attention of the Bench and Bar of the country. Mr. Shirley's course in this is highly proper and praiseworthy.

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WE return our thanks to Mrs. Myra Bradwell, editor of the *Chicago Legal News* for a handsomely bound copy of Vol. 5 of that valuable periodical. We highly recommend the *Legal News* to all our readers as well worthy their patronage.

## NOTES.

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[From July Number of Southern Law Review, 1873.]

It is a well established rule that when a subscriber, especially to a periodical of this kind, fails to notify the publisher of his wish to discontinue his subscription, an implied assent or direction is thereby given for its continuation. And this is just. It is, moreover, recognized as just by the law. The expense and labor, necessarily to be incurred, were the publisher required at the end of each term of subscription to notify the subscriber, and to request a renewal thereof, would be very great, and would probably in most instances, render an enterprise of this kind wholly impracticable. Whereas, the subscriber, should he wish to discontinue, by postal card notification, is put to but little labor and an expense of only one cent. We wish to say a few plain words on this subject. We want our list of subscribers increased, but not with the names of those who pay us only in unctious self-laudatory expressions of patronage. We do not stand in need of this. Kindly words of encouragement and praise are appreciated and valued. But we wish it understood, and distinctly, that we deem this publication a worthy one, and a full and fair equivalent for the price of subscription asked for it. We wish no one to subscribe to it who does not think this also; and if there are any such among our present subscribers, we would like to know that fact, and assure them of their mistake. We are compelled, however, until notified, to take for granted that those who fail to so notify us, wish their subscription renewed, and accordingly the first number is sent them with bill for the year. What we have written has been provoked by the fact that some of last year's subscribers, upon receiving bills for the present year, have answered us that they did not authorize a renewal of their subscription. And yet these gentlemen received both the first and second numbers of the present volume, paid postage as the law requires, *for the entire year*, on receipt of the first number, saw their names advertised in the Chart of the Southern Law Review Union, retained the copies sent them for months, and when returned, if at all, soiled, and consequently, worthless to the publishers, and in the face of all this, put in this plea as an excuse to justify their refusal of payment. To whom we reply—if, upon the expiration of your subscription, you did not wish its renewal, you should have so informed us. Your failure to do so, was authorization to us to continue it. As lawyers, you should have known that this has been so held and declared repeatedly by courts of the highest authority, and strictly in consonance with natural reason and equity. As gentlemen, you ought to have known that good morals required it—forbade, at least, your receiving the numbers, using them until rendered worthless to the publishers if returned, and after you had enjoyed all the benefit you were capable of deriving therefrom.

We have received many letters from different portions of the Union, some from quite eminent jurists testifying to the merit and worth of this REVIEW. In many of the States it is already being quoted and referred to as a high authority. It is the only legal periodical published South, and we confidently assert second to none in the United States. One of its aims, surely a laudable one, and one which, if at all likely to succeed, should have at once rallied to it the united support, of, at least, the Southern Bench and Bar, was, to represent and to aid in developing and maturing the

highest legal culture of this section. If the lawyers of the South approve, and feel interested in the success of this attempt, assuredly it is but right that they should evidence it by kindly word and deed. We bespeak the assistance of our present subscribers in enabling us to increase our circulation to that extent that the future of the REVIEW, as one among the first legal periodicals in the United States, may be beyond peradventure assured. We promise them that everything in our power shall be done to make it merit their patronage, and reflect the highest type of legal knowledge and thought.

### DOWER IN QUALIFIED FEES.

UNIVERSITY OF VIRGINIA, }  
November 3, 1873. }

*My Dear Sir:* I have read your article upon "Dower in Qualified Fees" in the SOUTHERN LAW REVIEW for October with much interest.

The case of *Ray v. Pung*, 5 B. & Ald., 561, is very summarily reported. It was a case out of chancery, and the judges give their opinion merely, without stating any reasons. The substance of it is as you cite it, (p. 624 of REVIEW). My edition of Kent does not contain the exposition of it to which you refer, nor indeed any mention of it at the passage named. It is certainly an extraordinary oversight of that great writer to suppose that the case involved the doctrine of *dower in a trust estate*. There was no *trust estate* concerned. The statutes of uses executed the uses in possession and gave C. D. a *legal estate*. The true ground of the decision seems to have been that a power of appointment exercised defeats the appointer's seisin *from the beginning*. Had C. D. not made an appointment (*as in fact he did*), his widow would have been dowable.

The doctrine for which you cite Crabb, (p. 624 of REVIEW), that "when a person has a qualified or base fee, the right to dower ceases when the estate is determined" was not *adjudicated* in Seymour's case, 10 Co., 96 A. There was no question of dower in the case, and whatever was said upon the subject of dower, was a mere *obiter dictum* at best, but there is no warrant for such a generalization in anything that was said. The case was in substance as follows: T. C. died seised in fee, having devised his lands to his son and heir H. C., in tail, remainder to S. C. in tail, remainder to the heirs male of T. C. (the devisor) in tail, remainder to the right heirs of the same T. C. in fee. H. C. entered and was seised as above *in tail*, with remainder over, and reversion in him in fee as heir of T. C., and while so seised, by *bargain and sale* duly enrolled, conveyed the land *in fee* to W. H., who entered and was seised accordingly. From W. H., by several intermediate feoffments, the land passed to E. S., and H. C. having died without issue, T. C., the son and heir of T. C., and next heir of H. C., entered upon E. S., and dispossessed him, whereupon E. S. instituted an action of ejectment against T. C., and the question upon a special verdict finding the foregoing facts, was as to the comparative goodness of the titles of E. S. and T. C. The first resolution of the court, as reported by Lord Coke, is in these words: "1. That by the deed indented of bargain and sale enrolled, the bargainee had an estate descendible to his heirs, determinable upon the death of the tenant in tail, and also he had the reversion in fee expectant upon the estate in remainder in tail, and that *the wife of such bargainee should be endowed*: And therewith agree 24 E. III., 28, b. in S——'s case; but *such dower shall be determinable by the death of the tenant in tail*." Now, in reference to the case then under examination, the doctrine conveyed in the latter clause of this

extract, so far as *underscored*; although not relevant, is yet, allowing for some inaccuracy of phrase, unobjectionable law. The bargainee's estate having been determined, not by the *death of the tenant in tail* but by the *entry of the remainder-man in fee*, the latter thereby became invested with his proper estate, and the bargainee's seisin *quoad the fee-simple*, was put an end to *ab initio*, as in case of recovery by title *paramount*. Of course, therefore, the bargainee's wife's dower was liable to terminate with his estate thus defeated *from the beginning*. See case of *Fines*, 3 Co., 84 a., N. (A.) Seymour's case then, is not in your way.

Sammes and Paine's case, cited by you (p. 625 of REVIEW), as reported in Leonard, whence you make your extract, is very much in point to sustain your view, but it must be noted that in the report of the same case by *Anderson himself*, (1 And., 184), no such point is mentioned; and in Goldsborough, 81, the observation of Anderson, J., is stated to be that, "If an estate be determined *by limitation*, this will not avoid a tenancy by the curtesy; but otherwise it is if the estate be determined by a *condition*, for this shall relate to the *defeasance* of the estate." As the case is reported by Lord Coke, (8 Co., 34, a. f.), the remark does not occur in either form, but it is said (the case being one of an *estate tail* run out by failure of issue), that curtesy and dower are not derived merely out of the estate of the consort, but are created by the law, by privilege and benefit of law *tacite* annexed to the gift. 36 a.

I have remarked thus at length upon these three cases because you do not seem to have had access to them, and the two first appear to have occasioned you more trouble than I apprehend upon the full presentation of them, you will think they need to have done.

With great regard, I am yours, very truly,

JOHN B. MINOR.

EDMUND S. MALLORY, Esq., Jackson, Tenn.

The above extract is intended as a note to the article alluded to and is deemed important because the views expressed in the article, relative to that class of base fees denominated Limitations, are at variance with those of most of the text writers, and a full presentation from the original reports of Seymour's case especially, is very desirable as, with the exception of *Ray v. Pung*, quoted by Mr. Washburn, and the doubted case of *Flavill v. Ventrice*, where the court was equally divided, it is the only case cited to sustain their views, and I hope Mr. Minor will therefore, pardon me for the liberty taken with his letter.

It may be proper to repeat that in the eighth and eleventh editions of Kent's Commentaries, marginal page 43, notes D. and B. of the editions respectively, the case of *Ray v. Pung*, with two others, is cited to sustain the doctrine of the text, that the wife is not dowable of a trust estate. This fact, coupled with the fact that the case is not cited by Chancellor Kent to sustain the doctrines at m. p. 49, that dower will be defeated by the operation of (what he styles) *collateral limitations*, as in case of an estate to a man and his heirs so long as a tree shall stand; or until the building of St. Paul's church is finished, (nor at m. p. 51, where it seems especially appropriate); let me to believe that he did not consider the case as applicable (as it really is not to sustain the latter, but as applicable alone in some way to the former doctrine). I, however, have to confess an "extraordinary oversight" in not discovering from the statement of this case by Mr. Washburn, copied in the REVIEW at page 624, that the statute of uses executed the uses, and that there was no trust estate involved; thus making it impossible for it to have proceeded upon the principle in connection with which it is cited by Chancellor Kent.

EDMUND S. MALLORY.

JACKSON, TENN.

We have been permitted to print the following letter from Professor John B. Minor, of the University of Virginia, which we are sure will prove interesting and instructive to our younger readers:

UNIVERSITY OF VA. }  
December 15, 1870. }

*Dear Sir:* Yours of 6th received. I have pleasure in complying with your request touching a course of law study.

The book, best adapted to your purposes in the first instance, is Blackstone's Commentaries, the first three books of which you should read *studiously* after pausing to think, and to sum up in your mind, (it were well if you did it on paper too,) what you have read. The first time don't trouble yourself with the notes, which in the best edition (Chitty's) are numerous and valuable, but confine yourself to the text; the second time read the notes in conjunction with the text; and the third time devote your principal attention to the notes, making a close but cursory review of the text, and giving special heed to those passages which the notes illustrate.

The best way to read is to take the preliminary 'analysis,' and obtain from that a general outline of the whole book, and then examine attentively and thoughtfully, the analysis of each chapter before you read it, and having read it, with frequent reference to the analysis, go over the latter again several times, until you see clearly, the scope and import of the chapter. And when you have gone over a book, repeat the same process with the analysis of that. Thus you will find the analysis a powerful aid; first, in suggesting the general idea of the subject; secondly, in following it out systematically and logically; thirdly, in enabling you easily to make frequent reviews, (which are in a high degree essential), and lastly, in stimulating, and helping you to think.

Don't imagine that your real progress is in proportion to the number of pages you read. It is in proportion to the number you thoroughly master. A man who was completely possessed of all that is in Blackstone, by way of suggestion as well as of direct teaching, would be a remarkably well-informed lawyer. It is not indeed, probable that one will take in the numerous brief suggestions until he reads other books, or has a teacher to aid him, but the more he learns, the more he will be surprised at the multiplied forms of knowledge supplied by Blackstone and his annotators.

Having thoroughly learned thus, the first three books of Blackstone, I recommend next, Smith's Essay on Contracts, to be read in the same way, and then Stephen's Pleading, including the appendices, and finally, Smith's Mercantile Law.

Don't trouble yourself all this time, with the American Statute Law, but give careful heed to the English Statutes mentioned by the several writers, most of which have been re-enacted in the United States.

The books named will probably occupy you (if you learn them as you ought) for a year, so far as direct law-study is concerned. But there are certain collateral topics which must engage some of your attention.

The history of England is particularly necessary for the lawyer. He ought to acquaint himself with its incidents, and especially with the various phases of its social order, as familiarly as he can. The most important period to the mere lawyer, is from the time of Alfred (A. D., 871), to the accession of James I, (A. D. 1603); and to the student of political law, the period from the accession of James I, to the accession of George III, (A. D. 1760). For the former period, Hume will do very well, but for the latter, as far as he goes, Macauley is preferable.

I am far from undervaluing the history of the United States, but I know not what to recommend which would be *summary* enough. I know not what better means of information to point you to (being within a reasonable compass), than Marshall's Life of Washington (2 vol.), and Rives' second volume of Life and Times of Madison. Incomparably the most interesting and important period of American history, is the twenty years that elapsed from 1781, the virtual conclusion of the war, by the surrender of Lord Cornwallis, and 1801, the accession of Mr. Jefferson to the presidency. In that short space is crowded a series of events, and of discussions, more important and valuable to the philosophic speculator upon the science of politics and government, than—I had almost said—in all the ages beside, since Nimrod instituted the "beginning of his kingdom at Babel." He who aspires to be even a *politician* (which is a very low aspiration as times are), and much more to be a *statesman*, or to have clear ideas—as a lawyer, who is not a pettifogger, ought to have—should make himself familiar with that twenty years *nocturna manu versate, versate diurna*.

As to the law department here, it consists, as you see, of two schools, in one of which (common and stat. law) there are six lectures a week, and in the other, four to five. Instruction is given chiefly by text-books, but very much more than is convenient by lectures. The student is examined daily, on both text and lecture, and in order to get the degree of B.L. must undergo satisfactorily a vigorous examination in writing on the subjects taught in both schools. No separate degree is conferred in the school of common and statute law.

The course for the B.L. degree is contemplated for two years, but if one can undergo the examinations satisfactorily, he can get it in one. It is conferred as the result of *examination*, and not *length of residence*.

I am, very respectfully, your obedient servant,

JOHN B. MINOR.

If our subscribers fail to receive their numbers as they fall due, they should within a *reasonable* time thereafter so notify us, and we will cheerfully supply the missing number. But it is not fair to expect us to supply numbers six or twelve months after their issuance, as we have frequently had to do during the past year. We mail each subscriber a copy, and if he fails to receive it the fault is not attributable to us. Nevertheless, wherever we are notified in time, and have it in our power, it affords us pleasure to supply missing numbers.

If those of our subscribers whose subscriptions are now due will *promptly* remit payment, it will enable us to benefit them by furnishing them with the best law quarterly in the United States.

Those of our subscribers whose subscriptions are now due would very greatly oblige us by prompt payment. Procrastination is a thief that filches from us more than we can well afford to lose.

T H E

# SOUTHERN LAW REVIEW.

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## MODERN THEORIES OF GOVERNMENT.

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### NUMBER TWO.

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*"Je le dirai toujours, c'est la moderation qui gouverne les hommes et non pas les excès." Montesquieu. Esprit des Loix. L, xxi, c. 22.*

*"A revolution is always the fault of the Government, never of the people." Goethe.*

If in the origin of society the popular element prevails, the tendency of civilization is to bring things back to the starting point. The people ceased to act, as we have seen, when the exercise of their power became difficult or impossible. Modern thought has been slowly but continuously at work to overcome the obstacles, and with distinguished success. The difficulty occasioned by extent of population has been obviated by the doctrine of representation, and the difficulty created by extent of territory has also been met by the modification of the federative system. It is the part of wisdom to look the difficulties in the face, and endeavor to meet them. For, notwithstanding the momentary reaction growing out of recent causes, it is certain that Democracy is not a local or passing incident, but a fixed fact. "It is," says M. Guizot (*De la Democratie en France*) "the development, others would say the unchaining, of the whole human nature upon the entire line, and from the profoundest depths of society." It is a prevailing element in modern social and political life, and must be taken into account by the statesmen and economists. It was with a thorough

conviction of this truth that M. DeTocqueville entered upon the task of studying the democracy of America. He looked upon the present age as the commencement of what he calls the "democratic eras." The idea was not altogether without its terrors, but the way to obviate its evils was, as he felt, to face them. The whole subject should be carefully studied, and society prepared for the inevitable. Fortunately, this eminent thinker was deeply imbued with a love of liberty, and a wide philanthropy. He bent his energies to the discovery of the social and political tendencies of what he deemed the most important element of modern society, with a view to discover its advantages, and to remedy its evils. His work on Democracy is a wonderful performance, and must form the groundwork of all future studies of the same great theme. His conclusions, it is true, although correctly deduced from his premises, are liable to be modified by circumstances not taken into account by him. They are frequently based on the supposed action of democratic principles on human nature, without making any allowance for difference of race, of climate, of locality, and of custom—all of which have an influence on the result. He is fully conscious himself of the efficiency of these causes in modifying his deductions, but it did not come within his plan, nor, perhaps, was he prepared by previous study, to take them into consideration. Another profound modern thinker, equally imbued with the love of liberty, had commenced work on this broader and more complicated field, but was cut off in the midst of his labors. Incomplete as it is, the introduction to the History of the Civilization of England of the lamented Buckle, is a masterly performance. Like all original thinkers, he has been led a little too far by his own theories, but the careful reader has no difficulty in avoiding the same fault. Both these eminent men look to the people as the foundation of modern government, and are warm advocates for liberty, and the spread of intelligence. Each is a correction of the other, when the latter is carried away by his favorite hobby. The Englishman, singularly enough, thinks that all progress is dependent upon the spread of knowledge, without reference to religious or moral teaching, while the Frenchman lays great stress upon the latter keeping pace with the former.

Enlightened by the experience of the last half century, and by the studies of a new school of philosophers, the modern publicist no longer bases political institutions on the so-called "rights of man," and the mythical "law of nature," but upon expediency. The question no longer is one of abstract ethics—for the ethics of



any age is now fully recognized to be only the resultant of the civilization of the particular period—but of practical fact. What character of political institutions, and what amount of freedom are adapted for a given people, taking into consideration its past history, and present status—that is the problem for the statesman, not whether this or that form of government, or this or that degree of liberty is more consistent with our ideas of the nature and destiny of man. The extent to which any one people may be entrusted with liberty, or with a voice in public affairs—two very different things—is a point of vast importance and difficult solution. The Englishman has a larger degree of security in the enjoyment of life, liberty, and property, than perhaps any other nation, while he has very little voice in the control of public affairs. The Frenchman, on the other hand, is entrusted with the selection of his rulers—universal suffrage being the rule in all the elections—but has his liberty wofully curtailed by the authority of government. In America, we have the liberty of the Englishman and the franchise of the Frenchman, and yet our rights of liberty and franchise have been marred by their very excess. The one has degenerated into license and the other into the tyranny of the majority. M. DeTocqueville is well justified, therefore, in saying that there may be other forms of democracy better than those exhibited by the democracy in America. We must find some counterpoise to the evils which our own institutions have produced, or invent some new forms for the exercise of the democratic element. Upon this subject, I propose to speak more at large further on. At present, it will suffice to observe that because the democratic element has assumed a particular form in America or elsewhere, it does not follow that that is the only or the best form. There may be others far preferable, which experience may hereafter develop. DeTocqueville, as we shall see hereafter, is as much opposed to the tyranny of the majority as to any other form of tyranny, and Sismondi does not hesitate to designate it as the worst form of all. Both these thinkers are unwavering advocates of the democratic element as an essential constituent of a good government. The former fears that universal suffrage, unless modified, will prove injurious by driving the best men from political life, and elevating the unscrupulous demagogue. The remedy he suggests is not to restrict the franchise but modify its exercise by a double election—that is, by leaving to universal suffrage the choice of electors only by whom the representative is to be finally elected. The suggestion was tried in France under the

first empire, and again under Louis Phillipe, the practical effect in both cases being to render the people apathetic as to the exercise of the franchise, and to make the first election very much a form. In America, however, where the Federal constitution had adopted the mode of double election in the selection of the President, and of the Federal Senators—the benefits intended to be attained have been effectually done away with by the practice which has grown up of designating the candidate in advance. Sismondi is far more decided than DeTocqueville. He ridicules the idea of universal suffrage as giving the power to those who are least qualified to exercise it judiciously, and as necessarily leading to the tyranny of the majority over the minority—the worst, in his view, of all possible forms of tyranny. “In regard to popular elections,” he says, “the question is not one of principle but expediency. We must not talk of the right of every citizen, of every individual, to be represented, but of the right of every citizen to be well governed; of his interest in this, that society should in every case make the best choice possible; of the right, in fine, of every individual to be respected, and that society should entrust to him such participation in political power as will protect him from oppression, without exposing him to too great dangers from his inexperience and his imprudence. In truth, political institutions are good only in so far as they attain this end. Nevertheless, the poor and obscure citizens are not those alone who have need of a defense for the protection of their rights; all classes, and all portions of society stand in need of the same protection. Publicists who found universal suffrage on the sovereignty of the people, forget that there is no pre-existing contract by which the minority are bound by the will of the majority. This rule of deliberation has been introduced as expedient in the laws, in virtue of a precise constitutional stipulation; it is not at all inherent in human nature or in the formation of society; it may easily change into frightful tyranny, and examples are not wanting even in countries thinking themselves free. Sometimes, the minority is circumscribed by a territorial boundary, and a province is oppressed by another province more powerful, or even a nation by another nation. Thus, Holland was oppressed by Spain, America and Ireland by England; and in the smallest of Republics, the Bailiwicks conquered by the democracy of Sewitz, and the Bas-Valois by the democracy of the Haut-Valois.” *Ma foi*, we have another instance of the same result in the greatest of Republics now being enacted before our eyes.

In this connection, another extract or two from the same author may not be out of place: "National reason is something more elevated than public opinion; for the latter, although generally clear-sighted, is often also precipitate, passionate, and capricious. It is only after the storms have calmed down, after dissensions have been conciliated, after all the flashes have been combined into a single light, bright, calm, and equal, that the national reason pronounces, and that its judgment ought to be the law. Two things are, consequently, equally necessary in order that the national reason may exercise its sovereignty; the one, that public opinion may have entire liberty of forming itself; the other, that it never precipitately brings about the sovereign decision; but, on the contrary, that society rest at anchor, and that constitutional obstacles are so arranged that every change must be gradual." (*Etudes Sur les Constitutions Libres*, p. 133.) "When the sovereignty is confided to the general will, it is supposed that nothing is more easy than to ascertain that will; that it is only necessary to propose to the whole the question to be decided, and then to count the votes. There can be no greater mistake. Among those who answer yes or no, three-fourths, incapable of understanding the question, have not thought at all, and have not really willed. In order to guard them from the consequences of their own precipitation, it is necessary to give to the minority the means of resisting the majority for a time; to ensure slowness of deliberation in order that those who are consulted may have leisure to enlighten themselves, and of willing in reality that which they vote, before commanding, and before obedience." (*Ib.*, p. 188.)

Montesquieu, in the first chapter of the ninth book of the *Spirit of Laws*; has, with his usual terseness and epigrammatic point, summed up the advantages of a Federative Republic. He esteems it, and in this he is followed by DeTocqueville and Sismondi, as the best of all forms of government. "This kind of republic," he says, "when strong enough to resist external violence, may maintain itself in grandeur without internal corruption. The form of the association prevents all inconveniences. A usurper can rarely ever be equally influential in all the confederate States. If he makes himself too strong in one, he alarms all the others; if he subjugates a part, those parts which remain free can resist him with forces independent of those he has usurped, and overwhelm him before he has established himself. If a sedition occurs in any one of the confederate members, the others may appease it. If abuses are introduced in some parts, they are corrected by the sound parts. The State

may perish on one side without perishing on the other; the confederation may be dissolved, and the confederates remain sovereign; composed of small republics it enjoys the benefits of the internal government of each; and without it has, by force of the association, all the advantages of great monarchies." M. DeTocqueville has most happily expressed the idea conveyed in the last sentence of the paragraph just quoted: "The local State governments give to each member of the confederacy the benefits of small nations, while the general government has all the power of a great empire. The Union is free and happy as a little nation, and respected as a great."

One objection to this form of government is thus met by Sismondi: "In our day," he says, "the opinion generally prevails that confederations are feeble in war, because in them is not seen central power, and unlimited authority; because confederations can not avoid divisions and irresolution in their councils, or slowness of execution, whenever a plan of attack is to be formed, or their forces used beyond their own territory. In truth, of all forms of government, a confederation is the least proper for a war of invasion, an offensive war. This incapacity is, perhaps, an advantage, for republics are naturally pugnacious, and it is advisable that the form of their government should afford a guaranty for the preservation of peace. But consult history, and it will be found that there has been no war of freedom, no war of brilliant popular resistance, which has not assumed the character of a war of confederations. In effect, in order that a nation may exert an energetic resistance, it is necessary that it be endowed with life, not only in its chief seat, but in all its members; and that, in whatsoever place an enemy present himself, he encounter not only a material force, but an independent thought and will. Each village must defend itself as a republic which feels that its whole is at stake, and that the battle to be fought is an effort of life or death." The conquest of the great monarchies of Asia was easy enough, either by a Mede, a Persian, a Macedonian or Turk—for when the army was destroyed all was lost; but Xerxes, with all his hosts, failed when brought into conflict with the free cities of Greece. The resistance of the United Provinces of Belgium and Holland to the power of the Spanish monarchy, and of the American colonists to the British empire, are equally marvelous instances of confederate strength. The melancholy drama now enacting on the fields of the New World, shows that strength both in an aggressive and a defensive war. Let us hope that the result may not altogether belie the assertions of Montesquieu.

With these general views, we are prepared to look more closely at

the three forms of government, which may be considered as representing modern civilization in its highest phases—the imperial republic of France, the monarchical aristocracy of Great Britain, and the democratic confederacy of the United States. For this purpose, I propose to give an outline of the constitutional machinery of the first, and to consider the essential elements of the two latter—taking the analysis of DeLolme and the treatise of DeTocqueville as the basis of my observations. These may be followed by some reflections on the defects brought to light in the workings of the American system, and some suggestions as to the means of remedying these defects. My European experience has thoroughly satisfied me that no sweeping change of any system is advisable—that the best we can do is to rectify obvious evils, and leave the rest to time. The very same evils exist, more or less, in all governments. We often see the mote in our neighbor's eye without being at all conscious of the beam in our own. Still oftener, we are apt to fancy the ills we suffer as the exclusive fruit of our own institutions, when the same, or analogous, or even worse ills, exist in the institutions of other nations.

The French system of government, so very different from what ours has been, is a curious and instructive study to an American, particularly when considered in connection with the past history of France. Previous to the revolution of 1789, the government was an absolute monarchy, there being no real check on the royal power. The nobles had degenerated into a privileged caste without any political power as a body. The judicial parliaments, outside of their functions as tribunals for the administration of justice, only recorded the edicts of the king. The people were ground down by taxes, for the support of the luxury of a profligate court, and all power was centralized at Paris. The revolution of 1789 was, in the beginning, an effort on the part of all classes to rectify some of the grosser abuses of this system, and to introduce the popular element to some extent in the government. Unfortunately, the reaction against the former state of affairs was infinitely greater than any one could have foreseen, and the pendulum swung to the other extreme. After a reign of Terror, and a period of anarchy, the nation was fain to seek repose once more in despotism—but despotism claiming to be based upon popular will, not divine right. The restoration of the Bourbons was a return to the old system so far as it purported to be founded on the "higher law," but it was accompanied by some concessions to freedom, rendered necessary by the exigency of circumstances.

These concessions, after a stormy and unsatisfactory experience, were virtually withdrawn by the celebrated ordinances of Charles X. The expulsion of the elder branch of the Bourbons, and the elevation of Louis Phillipe to the throne, immediately followed. The change was inaugurated by large concessions towards the establishment of a liberal constitutional government. The experiment was fairly tried and found wanting. The most intelligent Frenchmen—the Guizots, Thiers, Lamartines, etc.,—when entrusted with legislative functions, exerted their abilities not for the development of free institutions but for office. Faction, and not patriotism, ruled the Legislative Assembly. The public press, instead of proving the palladium of liberty, ran into the most violent excesses. The whole country was fast verging to a state of anarchy. The revolution of 1848 and the temporary establishment of a republican form of government, were the results. A few years of incessant conflict between the President, a turbulent and unprincipled legislative body—each member aiming at his own interests or that of his faction, never of the country—and a profligate press, led to the *coup d'état* of 1851, and the subsequent re-establishment of the empire in 1852. The French people had become satisfied that they were not prepared for free institutions in the English sense, and that hereditary monarchy was essential to the repose of the State. They feared that the elder Bourbons would not concede even that degree of freedom for which they were qualified, and they had no respect for the younger branch. Moreover, Napoleon I. was their idol, and his legal successor under the imperial *regime* was at the head of affairs, and had already given indications of that consummate ability which has since marked his career. By an overwhelming popular vote—what the French call a *plebiscite*—the Napoleon dynasty was re-established, and the existing constitution adopted. Napoleon III. has not proved unequal to the high position to which he was thus called. He has restored the French prestige, lost by his immediate predecessors, and made his nation a first-class power in the affairs of the world. He has, moreover, wonderfully enhanced the internal prosperity of France. He has the comprehensive grasp of mind and strong will of his uncle, combined with a prudence, and pliability to circumstances, all his own. The helping hand which he extended to Italy has given him a claim to the liberal feeling of Europe, and his effort to save Mexico from anarchy, if it succeeds, ought to entitle him to the thanks of the civilized world. He has done in the latter case what I have for twenty years said it was the

duty of the United States to do in the interest of humanity, and as a necessary corollary of the Monroe doctrine. If we denied to other nations the right to interfere in the affairs of the North American continent, it was our duty to see that there was no just ground for such interference. Accordingly, I have always contended for such a protectorate of the Spanish Republics as would insure to them a stable government. And we certainly have no right to complain now that the task has been taken in hand by others. Let me add *en passant*, that the new Emperor Maximilian has before him a very difficult task—far more so than it would have been to us. He has to run counter to the prejudices of half a century; we would have been aided by those prejudices. He will draw slowly from Europe the fresh blood which we would have transferred at once into the worn-out body. He has, it is true, the strong support of religion, if he can only retain the clergy, without, by the course necessary to accomplish that, alienating the intelligence of the people. His main-stay will, however, be the continuance of the civil war in the United States. Terminate that war in any short time and his chances of ultimate success will be greatly diminished. “*Sed revo-care gradum.*”

The government of France is, in effect, a despotism based upon popular will, but with machinery sufficient to enable the people to enlarge the circle of freedom gradually according to its own requirements. Unlike the old monarchy, which rested its authority on divine right, the present dynasty derives its authority directly from the people. In an actually despotic government, this distinction in theory may not seem to be very important in fact—but it is. Under the old system, whenever a conflict occurred, the difficulty was aggravated by the high claims of the royal authority. Bad measures, impolitic actions, were often adhered to for no better reason than to sustain the assumption that the King could do no wrong. The only answer to such claims was successful rebellion. Under the new system, the whole question is one of policy. Even an arbitrary act, if resorted to, is sought to be sustained upon the ground that it is for the benefit of the people. There can be no object, as long as hereditary monarchy is considered essential, to change a dynasty which owes its authority to the people, and purports always to act for their benefit, unless, indeed, the act should always belie the pretense—scarcely a supposable case. In the vast majority of instances the interests of the government and the governed are one, and he would be a very stolid ruler indeed who

should always take the side adverse to his people. The change, therefore, in the supposed origin of the sovereign authority, is in reality a change in the fundamental principles of government. The voice of the people in such a government is virtually omnipotent, if the matter is of sufficient importance to produce something like unanimity in the masses, and is never without influence in the general direction of affairs. If the French people were agreed that a legislative assembly, with the right of instituting measures, was desirable for them as a nation, they could at any general election declare their wishes so unmistakably as to secure the result. The truth is, however, that there is no such conviction. On the contrary, the people are now, after twelve years of imperial rule, as well satisfied as they were in 1852, that their quiet and prosperity are better secured by intrusting the initiation of measures to the government, than to an assembly, the opposition members of which consist of the violent partizans of either the elder or younger branch of the Bourbons, or Red Republicans. In the present assembly, elected last fall, the opposition numbers less than thirty members out of two hundred and sixty-two, and has no common bond of union. A free parliament might prove a curse rather than a boon, until the present dynasty shall have become as firmly established as the Brunswick family on the throne of Great Britain. The French, to their credit be it said (although the fact itself may not be much to their credit), are fully conscious of the fact and act accordingly.

A noted Paris guide-book thus commences its account of the French government: "The Emperor governs the country constitutionally, conjointly with a senate, a legislative body, and a council of state." The phrase is carefully worded, but it would be nearer the exact truth if the words "conjointly with" were replaced by the words "through the instrumentality of."<sup>1</sup> The constitutional provisions are such that the Emperor, if he has the capacity, really governs. If he has not the capacity, it would be the Prime Minister, the Richelieu, or Colbert of the hour, who would govern in his name. The constitution referred to is that made by Louis Napoleon as Prince-President, in January, 1852, in virtue of the authority delegated to him by the French people by the vote of the 20th and 21st of December, 1851, modified by the *Senatus consultum*, of December, 1852, after the *plebiscite* of November, 1852,

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<sup>1</sup> And in fact that is what the constitution itself says—the Emperor "*gouverne au moyen des ministres*," etc., (Art. 3.)

re-establishing the imperial *regime* in the Napoleon family. That constitution, so modified, fixes the form of the government as a hereditary empire in the Bonaparte family, defines the powers of the Emperor, settles the mode of formation and authority of the Senate, the mode of election and powers of the Legislative body, the mode of appointment and authority of the Council of State, and of the High Court of Justice for the trial of political offenses. It will be seen, after we have given the details of these several heads, how admirably everything is dovetailed to give the form of constitutional government, while retaining in the hands of the executive the substantial power. The constitution contains no distinct bill of rights. The first article is, however, thus worded: "The constitution recognizes, confirms and guarantees the great principles proclaimed in 1789, and which are the foundation of the public rights of the French people." This provision is broad enough to embrace all the numerous stipulations relating to the "inalienable rights of man," and the favorite French doctrines of "liberty, equality and fraternity," with which the revolutionary constitutions and declarations are profusely garnished. At the same time, the clause is vague enough to mean something or nothing according to circumstances. Like the English constitution, it leaves a broad margin to conjecture, and the exigency of the particular occasion. No doubt the words contain more meaning to a Frenchman than to a stranger. The principles of 1789 are with him like the principle of 1776 with us—something to glorify over in ordinary times, and neglect and violate whenever necessary. Perhaps the very generalness of the phraseology has its advantages. "The constitution of a State," says Sismondi, "comprehends all the habits of a nation, its affections, its remembrances, its necessities of the imagination, as well as its laws. It is only the least part of the constitution that is ever written. It can not be ascertained in its entirety until to a profound study of the national history, is joined a study, not less scrupulous, of the national spirit, of the domestic habits of the country, of the climate, in fine, of all that influences the character of a people."

The constitution, we have said, makes provision for its own amendment. The point is thus presented by the Prince-President in his address to the French people, accompanying the constitution: "The Emperor (Napoleon I.) said to the Council of State: 'A constitution is the work of time; too large an opening for ameliorations can not be left.' Accordingly, the present constitution has only fixed that which it was impossible to leave uncertain. It has not

enclosed in an impassible circle the destinies of a great people; it has left for changes an opening sufficiently large to admit, in grand crises, other means of safety than the disastrous expedient of a revolution. The Senate can, in concert with the government, modify all that is not fundamental in the constitution; but the modifications which affect the primary bases sanctioned by your suffrages, can not become final until after they have received your ratification. Thus the people rest always masters of their destiny. Nothing fundamental can be made without their consent." These are "brave words," but, after making all due allowance for the ancient Pistol vein, there is a substratum of truth which tends greatly to reconcile us to the imperial *regime*. Here is no claim of "divine right" or "higher law," but the recognition of a pact between the government and the governed derived from the will of the latter, which may be changed according to circumstances. And as a practical illustration of the plastic character of the instrument, very material modifications were introduced before the expiration of the year which ushered it into existence. By a *senatus consultum*, ratified by a *plebiscite* of the people, the Prince-President became Emperor, with large additions to the Executive power and with the imperial sovereignty settled in the Napoleon family.

The Emperor, by the constitution, is head of the State, commands the forces by sea and land, declares war, makes treaties of peace, of alliance, and commerce; nominates to all public offices, and makes all the regulations and decrees necessary for the execution of the laws. Justice is rendered in his name. He has the sole initiation of laws. He has the right of pardon and amnesty. He approves and promulgates all laws and *senatus consults*. All works of public utility, all enterprises of general interest are ordered or authorized by decrees of the Emperor. The endowment of the crown and the civil list of the Emperor are determined for the duration of each reign by a special *senatus consult*. The Emperor appoints the Senators who do not occupy the position by virtue of their office or dignity—such as the Imperial Princes, Cardinals, Marshals, and Admirals—the number of Senators thus directly appointed being limited to one hundred and fifty. The Emperor presents, every year, to the Senate and Legislative body, by message, an *expose* of the state of affairs of the republic. He has the right of declaring the "state of siege," in one or more departments, under reservation of referring the matter to the Senate with the least delay. The consequences of a "state of siege" are determined by law.

The Council of State consists of from forty to fifty members,

appointed and removed by the Emperor at pleasure, each with a salary of twenty-five thousand francs. The French Princes and Ministers have the right of sitting and voting in the Council, but the former only after attaining the age of eighteen, and with the consent of the Emperor. The council is presided over by the Emperor or Vice-President appointed by him.

The Council of State is charged, under the direction of the Emperor, with the framing of bills to be presented to the Legislative body, and the drawing up all the regulations of public administration, and with the solution of all difficulties which occur in administrative matters. It sustains, also, in the name of the government, the discussion of bills before the Senate and Legislative body. The members charged with this duty are designated by the Emperor.

The Senate is composed of the French Princes, Cardinals, Marshals, and Admirals, and of such other persons, not exceeding one hundred and fifty, as may be designated by the Emperor, who hold the position for life and are not removable. Each member receives a salary of thirty thousand francs per annum. The President and Vice-Presidents are selected from the body by the Emperor. The Emperor, also, convokes and prorogues the Senate, and fixes the term of its sittings. The sittings are secret. The Senate is the guardian of the constitution and of the public liberties. It regulates by *senatus consults*, to be submitted to the Emperor and promulgated by him, all matters not specially provided for by the constitution, and which are necessary for its execution. It also regulates, in the same way, the constitution of the colonies and Algeria. No law can be promulgated without being first submitted to the Senate. It may refuse its sanction to laws contrary to, or which attack the constitution, religion, morality, freedom of worship, individual liberty, the equality of citizens before the law, the inviolability of the rights of property, the principle of the immovability of the judicial officers, and all laws compromising the defence of the national territory. It maintains or annuls all acts referred to it as unconstitutional by the government, or denounced for the same cause by petitions of citizens. It determines by *senatus consult* submitted to the sanction of the Emperor and promulgated by him, the sense of all articles of the constitution which admit of different interpretations. It may, by resolution addressed to the Emperor, propose the bases of projects of law of great national interest. It may, in like manner, propose modifications of the constitution, which, if approved by the Executive, are fixed by a *senatus consult*.

Any modification, however, as we have seen, which affects the fundamental bases of the constitution, must be submitted to the universal suffrage of the people. The Senate only pronounces on the expediency of the promulgating of measures, either proceeding directly from the government, or previously voted by the legislative body, and can not, therefore, amend such measures; but it may amend *senatus consults*, whether proposed by the Emperor or a senator. In the case of the dissolution of the Legislative body, and until a new convention, the Senate, upon the proposition of the Emperor, provides by measures of urgency, for everything necessary to the carrying on of the government. An absolute majority of the senators present, exceeding one-third of the whole body, is necessary to pass a measure. The voting is always *viva voce*. Neither in the Senate nor Legislative body is secret balloting allowed.

The Legislative body consists of one representative for every thirty-five thousand electors. The members are elected for six years, by universal suffrage of the male citizens over twenty-one years, of age, and of six months residence in the electoral district. The present number of members is two hundred and sixty-two. The election is by separate and secret ballot. The law rigidly provides for the secrecy of the ballot. The tickets must all be white, and folded so as to conceal the name of the person voted for. If the ticket disclose by whom it is cast—for example, by having the voter's name written on it—it is at once rejected. The Legislative body discusses, and votes or rejects the projects of law and taxation submitted by the government. It can neither initiate nor amend measures. If the committee of the Legislative body, charged with the examination of a project of law, adopts an amendment, the amendment must be sent, without discussion, to the Council of State, and if not accepted by the Council, it can not be submitted to the deliberation of the Legislature. The latter may, however, send to the council three of its members to sustain proposed amendments. The debates first turn on the bill as a whole, and then on the separate articles. The vote is always open. The sittings of the body are public, but the demand of five members is sufficient to form them into a secret committee. The President and Vice-President are selected from the members by the Emperor. No minister can be a member. No petition can be addressed to it, the Senate having exclusive cognizance of petitions. The Emperor convokes, adjourns and dissolves the Legislative body; in which latter case a new one must be convoked within six months. The

salary of each member is twenty-five hundred francs per month during the session, the ordinary session being for three months. The proceedings of the house are taken by stenographers, under the direction of the President (who is entrusted with the authority to determine the contents of the written exposition), and submitted to the journals, who have the choice of publishing the whole, or a part relating to the same subject, *in extenso*, but are not permitted to make any other or different report. The Emperor opens the session with a speech from the throne, addressed both to the Senate and Legislative Body, each of which (since 1861), subsequently discusses and votes an address in reply.

From the foregoing *resume* it will be seen that the fundamental principles of the constitution rest on the will of the people, and can only be altered by a *plebescite*, or vote by universal suffrage, upon a *senatus consult* of the Senate, approved by the Emperor. Modifications of the constitution on points not affecting fundamental principles may be made by the Senate and Emperor, to whom also are left the construction of that instrument, and the regulation of executive and administrative matters not specially provided for by that document. The laws, within the limits of the constitution, are framed always by the Council of State, and are submitted by the government to the Legislative Body and Senate, who approve or reject, but can not amend. The legislature may, however, by committee, suggest amendments to the Council of State, and support such amendments before the council by not exceeding three of its members. If the council reject, there's an end. If they approve, the project of law is modified accordingly. The power of the executive is very great, but it is hedged in by provisions which secure at least wise advice, if the incumbent of the throne have ordinary sagacity and prudence.

The limitations upon the action of the legislature leave it very little freedom, and are severely felt in certain directions, such, for example, as the liberty of the press, and the centralization of administrative power. But in so far as the laws, which regulate trade and commerce are concerned, or those which affect the rights of property, and of individuals, the system shows to advantage rather than otherwise—at any rate, in ordinary times. How it might be in times of turbulence, or high excitement, admits of doubt. Now, all modifications of old laws suggested by experience, and all new laws rendered necessary by the progress of the nation, are readily obtained. The government watches the public requirements, and

never fails to take the initiative in all necessary cases. There is no danger, under the imperial *regime* of having a whole system of jurisprudence thrown into confusion by a hastily framed bill, got up, it may be, for a special purpose, and passed by party friends, as happens too often in America; or of having the learned fraternity puzzled by such long-winded and involved specimens of legislation as frequently emanate from the British Parliament. The President of the Republic in the preliminary address to the constitution, from which I have already quoted, put this point clearly before the people. "The Legislative Body," he says, "freely discusses, and adopts or rejects the proposed law; but it can not introduce on a sudden one of those amendments which often derange a whole system, or the entirety of an original project. For a still stronger reason, it has not the parliamentary initiation, which is the occasion of such grave abuses, and which permits each deputy to substitute himself, regardless of consequences, in place of the government, by presenting measures the least studied, and the least fathomed." In England, it may be well to remark, the legislative initiation of laws is largely guarded by the watchful supervision of the government—which always has at its disposal the very highest legal talent. In America, we have no such safeguards. It may be well for us to consider whether it might not be advantageous to have some of the advantages of legislative freedom, for more certainty of wise legislation. An executive council, composed of the Governor and two or three of the highest legal functionaries, might easily be formed to revise bills introduced into the Legislature before they are finally permitted to pass into laws. Such a council actually existed in New York for many years, and during that period the laws of the State were the models from which other States copied with great advantage. Since the change in her system, our American legislation has sadly degenerated.

The administration of public affairs, a most important part of the French system of government, is entrusted to the Emperor and his Ministers. The council of Ministers is composed of the nine heads of the various departments, viz: Minister of State, of Foreign Affairs, of War, of Finance, of the Interior, of Marine and the Colonies, of Justice, of Public Instruction and Public Worship, of Agriculture, Commerce and Public Works. This council deliberates on administrative legislation, on all that concerns the general policy, internal and external, the safety of the empire, and the maintenance of the imperial authority. The

Ministers hold office at the pleasure of the Emperor, and are only responsible to him, each for his own department. The object of this provision is to make them entirely independent of the Legislative Body—the English system, tried under Louis Phillipe and the Republic, not having been found to work satisfactorily. Besides, the idea of ministerial responsibility to the Legislature was entirely incompatible with the basis of the imperial regime—the subordination of the Legislative to the Executive. The salary of each Minister is one hundred thousand francs. The centralization of administrative matters in France throws an immense amount of business into these departments. The Minister of the Interior has general supervision, and complete control over all the municipal, departmental, and commercial officers, and of all the local authorities throughout France. The Minister of Justice has the general supervision of all the Courts of Justice and the immense number of judicial officials. Religion, instruction, and public works are all under the control of the State, and nothing is done without the previously obtained sanction of the supervising department at Paris. The government, in fact, exercises a paternal, or a tyrannical care—according to the light in which you may view its action—over its citizens from the cradle to the grave. There is no doubt that the system has many advantages in the present state of society, and under an intelligent ruler, but it has also most serious disadvantages. There can be no doubt, to use one of DeTocqueville's expressions, that the French are "functionized to death." By being kept continually in leading-strings, they lose the power of individual action. Self-government in national matters is impossible when the people have lost the capacity of self-government in local matters. The training of two or three hundred years has borne its fruit in France. No road can be laid out, no school house erected, no church built, no municipal improvement undertaken, without official consent, to be obtained through the local officials. Under the Bourbons, this was always a work of time and money, and, even now, the "administration delays," like the more famous delays of the law, are a serious evil. The Emperor has repeatedly expressed a wish to relax some of the reins of authority, and he has recently taken some steps in that direction. The bakeries which supply the people with bread, and the theatres which furnish them with amusement, have been freed from administrative shackles, and left free to public competition. The first effort, as might readily have been foreseen, has been to throw things

into confusion. Bread instead of being sold at a fixed price, varying with the price of grain according to a regular scale, has gone up and down somewhat like gold in America. Theatrical performances have, in like manner, assumed a most irregular and most startling confusion. Moliere has been played at the Vaudeville, and operas have been performed at the Porto St. Martin. To the Parisian, this is as startling as would be the re-installation of the goddess of reason in the Cathedral of Notre Dame. The running counter to the habits and prejudices of a people is worse than interfering with their freedom; and I begin to have a shrewd suspicion that the object of the Imperial government is to disgust the people with what the liberal press have been so earnestly clamoring for. I have not a particle of doubt that if there had been a very short harvest this year, the government would have been compelled to retrace its steps in the matter of the bakeries. And, unless managers show more sense, I am afraid some theatres must come once more under the iron rule—for to the Frenchman his amusements are almost as important as his bread. Centralization has been going on for several centuries, and I think it probable as many centuries will be required to accomplish the work of decentralization. No free government can exist in France until this end is, to some extent, attained.

Liberty of religious belief was one of the principles of 1789, still theoretically considered to be in force. But the Penal Code (§ 291) prohibits the assemblage of more than twenty persons at stated times for purposes of religious worship, or for literary, political, or other objects, without the previously obtained permission of the government, and upon such conditions as it may impose. Under the first Napoleon, and the same course is still pursued, the government took control of the Jewish, Calvinist, and Lutheran Churches. The public assemblage of these denominations is authorized, the pastors or priests are appointed with the sanction of the government, and are paid out of the public treasury. To the council of state belongs the decision of all questions arising out of acts done by these pastors in the exercise of their functions, whilst with regard to the assembly representing the whole of a religious community, the members are either chosen by the government, or their deliberations are confined to matters authorized by the law, and permission is necessary to the publication of their proceedings. No doubt, these privileges would be extended, under like restrictions, to other religious denominations, if the number of the

members were such as to render that course advisable. It is to the interest of the government, however, to keep down schism, and sustain the Catholic Church. The union of Church and State is very desirable in a centralized government. The Church of England, the Greek Church, the Armenian Church, and the Americans, have each places of worship at Paris, and are tolerated without any express sanction. There is a protestant denomination in France, known as the Free Church, which holds the doctrines of the Reformed or Calvinistic Church, but refuses the support of the State. This denomination is said to have increased largely within a few years. In some instances, it has met with opposition from the local authorities under the article of the Penal Code, above referred to. No religious body is permitted by law to form a procession outside of the precincts of a church, in any locality where there is a church of another authorized denomination. The importance of this regulation in preventing disturbances among an excitable and fanatical population, is obvious enough. The Catholics themselves sometimes violate its provisions, but only where they largely predominate, and even then in a very modest way. The tendency of the French mind is to Catholicism or infidelity—not to the half-way house of protestantism.

The government has adopted a general system of education, and provided for its management by councils of public instruction in each department, and a Supreme Council at Paris, the former presided over by the Prefect, the latter by the Minister of Public Instruction. These councils are composed of representatives of academies, of churches under the support of government, and of the courts, and certain public functionaries, and they manifestly embody the best material of the community for the purposes had in view. Upon these councils devolve all the details of discipline and instruction, care being expressly taken to prevent sectarian influences, and to secure to the children of parents of a particular religion, faith the supervision of their own pastors. Public instruction is distinguished into Primary, comprising elementary grammar schools; Secondary, comprising Lyceums and Communal Colleges; and Superior, comprising the Faculties of Law, Medicine, and Theology. Primary instruction is gratuitously furnished to children whose parents are not able to afford the expense of their education. I do not find that compulsory instruction is ever required. Each Commune is required to establish one or more primary schools, according to scholastic population. Pro-

vision is made for the separation of the sexes at an early period. Private schools may be established with the permission and conducted under the direction of the council of instruction. The frequent inspection of all schools, by competent persons, is carefully provided for.

The newspaper and journalistic press is controlled by stringent regulations. The proprietors are required, in the first instance, before commencing publication, to pay into the public treasury, by way of security, a sum varying from \$350 to \$5,000, according to the nature of the periodical, the plan of publication, and the frequency of its appearance. The interest on the sum, at a fixed rate, is paid by the State. The deposit is required as a security to persons aggrieved, and to the State for penalties incurred in the course of publication. A judgment rendered against the proprietor must be paid within three days, or the journal will be stopped. Every article of political, philosophic, or religious discussion, and every article in which are discussed the acts or opinions of citizens, and individual or collective interests, must be signed by the authors under severe penalties. Journals, also, are subject to suspension by the administrative authorities, after two warnings, for articles which tend to the disparagement of the government, or to bring the Emperor and his administration into contempt. It is necessary to know something of the history of the free press in France previous to the imperial regime, and to recollect its utter recklessness and depravity, to be reconciled to such legislation. And, even then, we are inclined to think the remedy worse than the disease, until we consider the peculiarities of the French character. The same violence and abuse, which in the English or American journals would make no serious impression on their readers, would in France excite a riot or a revolution, according to circumstances. I think it is Sismondi who says, that it may admit of doubt whether the meed of superior intellect should be awarded to the French or to the English, but that it admits of no doubt that the Anglo-Saxon race is better qualified, by its calm and dispassionate nature, for the practical exercise and enjoyment of the prerogatives of free men. The largest popular demonstrations may be held in England for political purposes, and no matter how heated the discussion may be, nor how warmly the people may respond to the vehement appeals of their leaders, the public peace is never endangered, while similar demonstrations in France would be the prelude to the wildest scenes of violence and blood. We should always bear this in mind, when

we come to pass judgment on the stringent regulations of the press in France, and on the prohibitions against political, religious, or literary assemblages of over twenty persons, not sanctioned by law.

If the French have little liberty in our Anglo-Saxon sense, and care less for it, it is not so with "equality and fraternity." Over the idea conveyed to them by this phraseology they are veritable fanatics. They recognize no equality of races even—although their government has been recently compelled to do so in the case of the natives of Algeria. The Emperor last year, acting upon the French idea, by a *senatus consult*, declared the native Algerines French citizens, with the rights and privileges attached. This year, after a sanguinary rebellion, he is fain to recall his premature document, and place the civil authorities in that colony once more under the control of the military. The French can not, any more than the American, bear the idea of grades of social rank as in England. And, yet, like the American here also, he is fond of titles, and taken with a decoration. The right of the Emperor to confer titles of nobility is not questioned—and the right is often exercised,—but the conferring of such titles does not in the least affect the equality of the individual "before the law." Moreover, as no seignorial rights are attached to the title thus conferred, as the law expressly provides for the equal disposition of property among children, and prohibits entailment, and even testacy except of a limited portion of property when there are children, it is easy to see that a time must come when these titles will be mere names, if not objects of contempt. Under these circumstances, the conferring of hereditary titles to descend to the oldest son, except in the case of the French Princes, whose endowment falls on the State, seems to be wrong in principle. The title should be, like the decoration of the legion of honor, personal and for life only.

To complete the picture of the French *regime*, we must add that a formal register of births, marriages, and deaths is required to be kept. A new-born child must be presented to the proper officer within three days after birth, under severe penalties upon the persons charged with the duty, and a formal entry made of the day, hour and place of birth, the name of the child, and the names, profession and domicile of the parents and the two witnesses required to be present at the making of the entry. An equally formal act of marriage is required to be drawn up, and duly authenticated, before the ceremony can be considered valid. No one can be buried without a written authority from the proper officer, whose duty it is in

person to view the corpse, and satisfy himself of the extinction of life. These formal entries of registration play an important part, not only in legal controversies and the ordinary police regulations of society, but in the changes of domicil, trade, and status of parties. Authenticated copies of the registry of birth must be produced in all cases, or their absence legally accounted for and supplied, before a marriage can take place. This last act requires the consent of parents, and must be accompanied by certain formalities which ensure a month's delay between the first public announcement and the ceremony. The ceremony essential to the validity of a marriage takes place before the proper civil officer, in the public hall of the Commune, in the presence of at least four witnesses, and a formal act is drawn up embodying numerous particularities and duly registered. A religious ceremony is not essential, but is usually added—the Catholic church imperatively requiring it as a matter of Church discipline. Divorce is not allowed in France for any cause. Separation from bed and board may, however, be obtained for such causes as usually authorize divorce in other countries.

The same rigid formalities which accompany every important act of life, are prescribed in trade and commerce. Every tradesman is required, under severe penalties, to keep books, the form and description of which, as well as the mode of making the entries, are distinctly pointed out according to the nature of his business. Nearly all the transactions of daily life, to be legally valid, must be accompanied by prescribed formalities. Manufactured articles must be stamped with an official mark, and even the quality of gold used in jewelry must be tested by the proper officer, and the article authenticated accordingly before it can be sold. The law carefully regulates the relations between master and servant, employer and employee, and, in fine, nearly every other relation usually left, under other systems, to private contract. To all these instances of a watchful and paternal care by government, must be added a system of civil and criminal police, unexampled for the number of its agents, the precision of its requirements, and the skillful adjustment of all its machinery. These agents are also effectually protected in the exercise of their functions by the limitation of their responsibility only to the government. An individual aggrieved by their action has no redress at law, unless the government authorizes the suit. These officials have an additional shield thrown around them by the restrictions on the press in regard to police

matters. Publications in such cases must be sanctioned, and journals must be cautious in the language used touching official acts. The system thus shadowed out is rather frightful to the free-born Briton, and his descendants, but it works well in France. In fact, it may be doubted whether any other system would work at all, with such a people. The Anglo-Saxon has an innate love of order and reverence for law. The Gaul is utterly deficient in both qualities, but has a profound respect for *authority*. The one may be safely left to himself in many cases where the other can not be trusted. To appreciate institutions, we must understand races.

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## CODIFICATION.

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To understand codification, it must be recollected that in every department of human activity there is a growing tendency at work always to simplify details. There is all the while a breaking up of some group of particulars and a re-arrangement of them with some other class. The reader who keeps up with the march of modern science is almost wonder-struck at the widening comprehensiveness of its generalizations. We need not stop to say that we agree or disagree with Herbert Spencer's magnificent attempt to unify all nature under the law of evolution and dissolution which he grounds on the solitary postulate of the persistence of Force. He says: "This being the basis of experience must be the basis of any scientific organization of experiences. To this an ultimate analysis brings us down; and on this a rational synthesis must build up." Yet the attempt, whether successful or a failure, is in harmony with the tendencies everywhere. Knowledge becomes better organized, and the longer the sciences are cultivated there is a slow decrease of what are claimed to be leading principles and a correspondent adjustment of the divisions or groups. To illustrate from no other science than that of agricultural chemistry, only note how the vast aggregate of details, which had begun to take intelligent shape under Liebig, have shrunk still more, becoming proportionably more intelligible under the luminous treatment of George Ville.

Now this tendency to simplification and ever-growing comprehensiveness of generalization is as potent in the law as it is in the sciences. We will by no means review the whole track of law reform to show the truth of our assertion. That would take a larger book than Reeve's History of the English Law. We will only touch rapidly on a few points.

The old law of pleading became a mighty maze and labyrinth, requiring years of devoted study to understand. Even before its abolition the indestructible tendency to larger generalization, and thereby to greater simplification was seen in every new author of merit. But even the simplifications of Gould and Stephen were not enough, and the whole of the law of pleading is rapidly becoming all over America attached to the provinces of grammar and logic.

The declaration or the bill or the plea are only to plainly and distinctly set forth the party's case; which plainness and distinctness he must ask of grammar and logic. Any man who can tell the whole of anything in a letter has the talent of the good pleader, and superbly neat pleading, under the new system, which abhors the old verbosity, will be rather a matter of taste than law learning.

We do not know how many of the profession will agree with us when we say that we think we divine a tendency of the law of statutory construction, which is of such growing importance in America, to coalesce with that of good pleading. For both deal with the meaning of language, and having therefore a common purpose, it may be expected that in due time both will be arranged as cognate sub-divisions under one greater group.

Look at the same tendency to simplification in that vast department which we term Equity. In spite of all the prolonged and frenzied staying of equity lawyers and chancellors, its doctrines, and even its procedure, are perpetually escaping to, and becoming domiciled in, the common law. Do we not see clearly that the lines of demarcation will be all effaced before many years? The grievance of turning out of court a complainant because he has a remedy on the other side of the same court, often presided over by the same judge who turns him out of chancery, will not trouble and harass much longer. We all of us see that the tendency now is to break up all of the details of equity and re-organize them with what we call the law, both in doctrine and procedure. It was a long stride forward to a greater simplification when courts became common, which had jurisdiction of both law and equity.

We have only time now to briefly advert to the late Supreme Court of Judicature Act of England, which comes into force next November, uniting the Chancery, the three Courts of the Common law, the Probate and Matrimonial court, the court of Admiralty, and "others of less note," all into one court, to be termed the Supreme Court of Judicature. "The courts thus constituted are to be guided by certain rules prescribed for the concurrent administration of law and equity. The substance of these rules is, that in every cause the court is to give effect to all existing rights and duties, whether they exist by common law or equity, or are created by statute, and to take notice of all equitable matters which incidentally appear."<sup>1</sup> The dullest man sees that the natural operation of this

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<sup>1</sup>American Law Review, Vol. VIII, 260.

act will be to simplify for England, not only equity and law, but also the whole law of procedure.

But we need not go away from home to find instances of the continual reduction of the great body of the law in many departments into smaller compass. Take as instances, from the statute book of Georgia, the garnishment Acts, and the Acts for the establishment of lost papers, ousting chancery of large jurisdiction, and the famous compilations in 1856, by Judge Cone, of the attachment and garnishment laws, and the limitation laws.

And thus there is found the ferment of change in every division of law and procedure. Each division is all the while striving to simplify itself; and then there is also going on the endeavor to digest, harmonize, and completely unify as it were the whole. This tendency in the separate groups to break themselves up and become re-distributed into fewer groups, and the other tendency to unify the various groups under the most all-embracing classifications, are the two active forces of codification. They are really but different manifestations of the same force, and we only divide them to distinguish—

“Two distincts division none.”

An attentive contemplation of the growing importance of law digests, which we now see are the heralds and van-couriers of good codes, will show clearly the operation of these two tendencies. We will discuss this more fully hereafter.

Having now shown the active forces of codification, let us, to understand our subject better, look somewhat closely at the nature of those laws which are to be codified.

Legislation goes on daily. The Parliament or Assembly may rest, but those other law-makers, the judges, are always busy. Society, ever changing, has ever fresh necessity for additional law, or changes of the old. There are some who exclaim with wonder over the bigness of the statute-book, and others who would keep the last revision or codification forever inviolate. But as an animal breathes involuntarily even when asleep, the work of legislation goes on unchecked. It is growth, it is life. If the lazy lawyer or tired judge, who is angry with the constant mutilation of the Code, could see that its immutability, which he often wishes, really means the death of civilization, he would retract in horror.

As a nation advances in civilization the body of its law has very slowly become larger; but the body of existing law will never at any chosen time be the sum total of all present and past. Often

there has been as much of repeal as amendment. Even in that large portion of the law which we collect from text writers and reporters, obsolescence and demolition have almost equaled accretion. And the compression of more extensive classification and widening generalization we have already explained.

The law will be found generally to be roughly measured to the needs of society. Whatever is wanted, if not in the statutes, is supplied by the judges, and what is not needed is thrown away, and is afterwards law only to antiquarians. The world moves and society is ever evolving, and our laws are but a part of the great caravan, and keep up with their companions of progress. The best Code will be only an accurate likeness at a particular age. The existing law, changing in detail, yet preserving the same volume in the main, is the great business of the lawyer and judge.

This body of the law should be made easy to find, and of easy intelligibility when found; that is, the laws must be properly collected, arranged and classified; and this is the object of codification.

It is now agreed on all sides, save by a few, who hold always that the past is superior wisdom, that a good Code will be better than long and tiresome hunts through "statute law, badly expressed, and made bit by bit," and miscellaneous and promiscuous reports. But how shall we have a good Code? Take any particular one of our States. Its laws can be collected from its statute book, its published decisions, the English statutes and reports, and the text writers (English and American), and the question is: how can all be incorporated in a good Code? Codifying must be first better understood. There must be long, persistent, organized and intelligent effort, seeking, however, only as a midwife, to help the natural tendencies of the law itself. A good Code will be the work of the entire profession, practitioner, judge, and author, understandingly co-working. The wisest statesmanship merely expresses or develops something already at work. It can not start the train but it can often mould and guide. The coming Code will be completed by a generation wise enough to fully understand the active forces of codification, and who also know that the law is a great living system, a part of nature, growing, wasting, and repairing, like other living bodies. These codifiers will have spurned instruction from none able to teach, and especially will they have attended to the efforts of practical men to digest the law, however humble and unpretending.

There has already been great preparation. The makers of abridgments and digests in England, Rolle, Viner, Comyns and Bacon,

not to go into more ancient times of the law, were the pioneers of our codification. And we have busy Americans whose names ring in every haunt of lawyers.

Everything indicates that it is but a step from the digest properly completed, to the Code.

A digest of decisions as usually made, sets down under an alphabetical arrangement of subjects the different pertinent points ruled by the Courts. Some of these compends of wider and more useful scope contain the statute law. The sub-distribution, under the particular subjects, is for the most part natural, that is, one dictated by the particular title digested.

For all of the mighty labors of the past the art of digesting is in its infancy. The improvements which are yet to be made are mainly three-fold:

1. A style of stating the points collected less diffuse and more precise must be attained. There is to all who will seek after it a judicious condensation which makes more clear and lucid, and which is to obscurity as a lamp is to darkness. The brevity of Comyns was never considered hard to understand. Phonetic writing is intelligible to the initiated, and there is a terseness of language which economizes more as compared with ordinary speech than phonographic does as compared with alphabetical writing, and which so far from being obscure is more intelligible to all than any other. Phonography saves in letters, but this brevity saves in words and in time necessary to understand.

2. The next improvement is that the author digesting reports shall seek to give the *ratio decidendi* more prominence than the point decided; or to express it more precisely, he will seek to show by his statement the *ratio decidendi*, that is, the law in giving the instance in which the law was applied by the court. Suppose the author finds a head note running as follows: "A deed which in law is invalid if not sealed by the maker was executed in the name of another by an alleged agent, and it was held to be void because the authority of the latter was not under the seal of the principal"—if he is in haste, and a mere book-maker, he will clip out and paste the whole of it into his copy. But if he seeks to make something more than a mere book, and uses his brains and pen at every step, he will, after finding the note to be accurate, say: "A valid authority to execute for another a deed requiring a seal, must be under seal." This is more easily grasped, because more condensed, and the *ratio decidendi*, which is always more striking to the mind than

the mere point of application, is given more prominence. Pithy sayings, whether old established Latin maxims or fresh utterances of gifted judges and authors, live in the memory of all lawyers. And there is the terse diction of the law, which should be studied more and more, and which specially belongs to the digest. The judge or reporter in his hurry has not given the true frame and expression of a head note, but the author making a digest can, by his example, teach how a head note should be made. And when made it will be a model not only for other head notes but for statutory clauses and sections of Codes.

3. The third improvement will be that the makers of digests will seek to give all the law and not confine themselves to the decisions or statutes of any particular time. They will look everywhere for the law in order to have each subject in their collection as near a complete compilation as can be. And in working out this improvement they will cultivate the same lucid brevity of expression which is the true language of the law, as is shown by the almost entire abandonment of the old verbosity of conveyances and pleadings. The most attention will be paid to the non-statute law and no source of information will be neglected. Suppose a digester laboring after this completeness to be at work on Larceny, and that he accepts as demonstrated law the doctrine of Mr. Bishop (1 *Crim. Law*, 4th Ed., §§ 105-108). Then possibly under the sub-title *venue* he will simply make a little expansion of the old formula, saying: "The thief triable in any county into which he carries the thing stolen—and in any State too if he there show intention to appropriate the thing stolen."

This will serve too as another instance of condensation; for the three sections covering more than two octavo pages are compressed into a line which merely speaks the law.

In this particular the text writers are advanced beyond the digest makers... Some of them, and especially our American Kent, and Story, and Bishop, have shown a commendable zeal and industry in trying to give us in whatever department they may labor, all of the law.

There are some books, however, which when closely examined foreshadow the future digest which will bring its collections from all sources of the law.

The whole expanse of decisions and authorities must be traversed and made to give the law only, however brief and short that may be. The ideal digest will be made by men who know the law, rather

than authors and reporters who care nothing for a decision save to collect its law, nor for a statute save to condense its exact meaning. This digest will be a complete Dictionary of Legal Rules.

The arrangement at first is of far less importance than the execution of the details. This is not saying that the arrangement and distribution of the law should not be studied. But from the independent nature of legal principles the principles themselves are of far more importance to the lawyer and citizen than in any shape in which they may be collected. Every rule of law is an aphorism and may be looked at independently and grasped and understood by itself. In a great majority of cases some particular rule is invoked and either allowed or discarded without much reference to any other. There are heads and sub-heads, leading principles and those of less scope, which belong not to the whole law but to some particular part. These leading principles are to be more and more contemplated for aphoristic, as they are the hoops that hold the law stanch, and are the true harmony of the law. And when our good digest comes it will bring with it the fit extension and tracing of every leading principle. We never open a book of practice in search of the law of ejectment but we are treated to the old saw that a plaintiff in ejectment must rely on the strength of his own title and not on the weakness of his adversary's. This but gives a little glimpse of one of the most comprehensive principles. Whether the State accuses of crime, or a merchant sues upon an open account, or a complainant proceeds on his bill, the party moving in any court on any side, must first shift the burden of proof from himself before the other defending is required to show anything. The plaintiff must make out a *prima facie* case or he breaks down and leaves the defendant secure, though the latter have no shadow of right. This principle will therefore be placed as one underlying the whole law of procedure and given its due prominence by the makers of the digest. We will give another example. The manifold objections to evidence discussed on a trial, all turn on the questions either of the competency of the testimony, or witness, or the relevance of the offered proof. The digester of evidence may generalize defining and instancing:

1. Witnesses competent or incompetent, and matters privileged or not.
2. Evidence original and secondary.
3. Relevancy.

When he fills out this skeleton from the reports, statutes and au-

thorities, he has digested—that is, both generalized and particularized—the whole of what, in imitation of Austin, we may term the *substantive* law of evidence. And the matter of relevancy is a rule of logic rather than of law, and here the subject begins to show a similarity to pleading and statutory construction which likeness of the three may yet build up some classification embracing, which we can not yet foresee.

And the digester will find two or three generalizations serve for the rest of evidence, and when he is done, if he has set down nothing but the law, he will not have twenty octavo pages, costing years however to make.

We do not believe that any of the examples which we have given are perfect. If they only approximate the *desiderata* of digesting and help to show our meaning it is enough.

We repeat, for we wish it attended to, that the great reform and amendment of the law will be at first in collecting and expressing its details rather than in its general arrangement. If the parts are complete they will serve, though not put together symmetrically. Suppose that the validity of the deed mentioned above as made by an agent not empowered under the seal of the principal, was a question unfamiliar and not settled. When presented to a lawyer he would have much search and turning of his library, and would at last, after a long induction, arrive at what he thought the controlling principle and therefrom would decide, which decision, in the shape of an opinion, might be wrong and mislead the client consulting to his damage. But were the principle, just as we have abridged it, authoritatively enacted as a part of the Code a tyro would find it without chance of error or mistake. Now there are some indeterminate number of legal rules and principles that society must use in every day life. These principles are not innumerable. The digest of which we prophesy, which will be a complete Dictionary of Legal Rules, will contain all of them in language defined by Lord Bacon, as translated by Shaw, “a well defined generality of words . . . which though it does not accurately explain the cases it comprehends, yet clearly excludes those it does not comprehend.” Then will there be a compilation of the body of law existing nearly complete for ordinary daily use from which a dull lawyer will solve any usual question with ease and promptness.

The great difficulty in advising on a given state of facts, after we have mastered the facts, is to find the rule of law controlling the case. Say we to ourselves, if the rule is so and so the client has a case,

but if its opposite he has none. Then we search to find what is the rule. Our books, where the statutes fail, are lamentably deficient. There are far too many books, and too little by far in each, that is, too little of what we seek after, to-wit: rules of law. When we contemplate the law separate from the dilutions, expansions, discursions and arguments of decisions, and text writers, and verbosity of statutes, we at once see how small it is as compared with its magnificent libraries. And yet it has never been all compiled in any age or country. There has been little effort to compile *only the law*.

The whole field, therefore, is to be worked over. When a man proposes to himself to make a digest he must aspire to give the whole of the law on the subject and not be content with stringing together a number of points decided.

We have before noticed that in extensiveness of collection the text writers are yet superior to the digesters. They are also, as yet, superior in deducing the law as a system from the points decided by the courts. Yet no one who studies the standard digests now publishing can fail to see everywhere the covert aspiration to shape and class the collected points decided under generalizations, which, year by year, approximate more closely accurate expressions of rules of law.

And when we examine our imperfect Codes, we see the same propensity pushing the authors even farther than the text-writers can go, and the codifiers will often harmonize and redact the statute law. For a statute is often as incomplete as a decision. And this must be added, and then still another will be passed, to cure all discovered defects. The codifier, looking over the imperfectness of the details and their incoherence, can hardly help, if he would, perfecting the former and erasing the latter by a complete fusion and recasting.

Again we repeat that the details are everything. The true arrangement we have not time to consider now. But judging from the practice of the best authors it appears to be (at least it will be so for a long time) in proper sub-division of the larger heads. The larger heads are distributed alphabetically, because thus they are easier found. As examples hinting, though imperfectly, at the true art of arrangement in sub-division, we call attention to the long admired "Pleader" of Comyn's Digest and "Leases" of Bacon's Abridgment. But it appears almost certain that of the two it is much the more important to have a collection of legal rules as nearly complete as can be, than to arrange them in any known or

unknown way afterwards. If the collection is complete, the rules will always be found, and out of use will come familiarity itself and arrangement.

After the brick are made we can shape the edifice.

It is the first step forward that we complete and perfect our digests so that they may presume to use that uncouth word of Bentham's and call themselves Pannomions. We must not be discouraged at the labor imminent and turn back.

The work of thoroughly going over the whole law and establishing, condensing and arranging, and making clear every parcel, must be pushed until all departments are digested.

The sneers at the busy men who work so hard to give us acceptable digests are puerile. Their labors are dictated by the necessities of society, and to the observing and reflecting they tell of the glories of the future. Those who set up to be philosophers should know that law is living and that its growth is spontaneous. All the study and effort in the world can not vivify an artificial plant. The only efficacy of thwarting nature is to dwarf, deform, cripple and kill. It is wisdom to look for germs of life, and things living and growing, and then strive to give the needed culture and care. This irremissive dependence on digests, their immense increase and sale, should arrest the thinker and he should set himself to work and try not to suppress but to improve. The principles of a digest should be mastered so that such books can be justly criticised to their amendment. All achievement advantaging the human race is in furthering rightly the tendencies of society already in play. Those are the wisest and most useful who best understand these tendencies, who look for them, and when found seek, if bad, to counteract, and if good to develop and strengthen.

We have already hinted that the general arrangement is not yet of the first importance. The time has not come it seems for throwing the law into a shape which may introduce its final arrangement. It will be many years before the momentous alterations which are now conforming the law to the advancement of modern civilization quiet down into a steady and uniform process merely keeping pace with the slow march of society. But the great reason for not yet attempting the final classification of the law is that the smaller groups and series have not yet been fully understood. The process of generalizing naturally widens from the smaller to the larger comprehension. Yet a few men, always hopeful of the future, love to look forward to the time when the law will not only be completely and compactly

collected, but also scientifically arranged. They are encouraged by the progress of the natural sciences and augur therefrom a rational classification at last. The following passage from John Stuart Mill<sup>1</sup> is instructive :

“Although the scientific arrangements of organic nature afford, as yet, the only complete example of the true principles of rational classification, whether as to the formation of groups or of series, those principles are applicable to all cases in which mankind are called upon to bring the various parts of any extensive subject into mental co-ordination. They are as much to the point when objects are to be classed for purposes of art or business, as for those of science. The proper scientific arrangement, for example, of a Code of laws, depends upon the same scientific conditions as the classifications in natural history; nor could there be a better preparatory discipline for that important function than the study of the principles of a natural arrangement, not only in the abstract, but in their actual application to the class of phenomena for which they were first elaborated, and which is still the best school for learning their use. Of this the great authority on codification, Bentham, was perfectly aware; and his early *Fragment on Government*, the admirable introduction to a series of writings unequaled in their peculiar department, contains clear and just views (as far as they go) on the meaning of a natural arrangement, such as could scarcely have occurred to any one who lived anterior to the age of Linnæus and Bernard de Jussieu.”

While this deserves meditation it must yet be remembered that Bentham and Austin, his great disciple, were not practical lawyers enough to see clearly that the true arrangement of the Code is that which most facilitates the lawyers' and judges' search for rules of law to decide independent and aphoristic cases—an arrangement, to use Mill again, for purposes of business. The permanent use of the Code will be in the courts, and judges and practicing lawyers must be consulted as to both its details and their classification.

A Code will not be made by people spending a life-time in a closet, nor can it be made by one man, nor will it be made by many in a jiffy. It must come slowly; the digest growing under the hands of many workmen, spontaneously and gradually, into a full-summed repository of mere law, all argument, opinion and everything dead, omitted; every parcel of statute and non-statute command

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<sup>1</sup> Logic, book IV., chapter VIII., § 5.

gathered from all sources, until some legislative committee of good lawyers, fresh from the practical atmosphere of Masters, Auditors and Chancellors, Judges and Juries, will take the compilation, reconcile its conflicts, fill up cases omitted, and supply the deficiencies pointed out, by a study and contemplation of the compilation itself, and reduce the whole law to harmony.

It will not be a gigantic book when it comes. If a painstaking and accurate lawyer will digest the law contained in Story's Equity Jurisprudence, those who have never seriously contemplated how little of law there is in any book would be astonished at the shrunken result.

The Code, not the imperfect Code which some of us now attempt, but the perfect Code, when it comes, will owe more to every class of legal workers than its own makers. The mark of the institutional writer will be on it; it will appropriate the epigrams of the judges and reporters, and it will steal from the briefs of careless lawyers who abandon all of their fame to the judge delivering the opinion. The historian will be able to trace all these channels of supply through the forerunning digests.

Will it stay when it comes? Possibly a long time in plan, but not so long in volume; but its details will shift rapidly, year after year. The plan now and then will be altered little by little, steadily growing up to more comprehensive generalizations. The body of the law will swell a little, but every hour society will cast away some interest and acquire another, for which legislatures, or those *ex officio* law-makers, the judges, will at once provide a law, soon to be put in its proper place in the Code.

Codification is a necessity, and let us rejoice at it. A great many have argued that it is better for society and better for the law that it be buried out of sight. Law, like Latin and Greek, say these censors, preferring the husk to the kernel, should not be made too easy. The practical world reads Plato, Aristotle, Plutarch, even Homer himself, in translations, and keeps struggling on after a code for all of this preaching. As these obstinate creatures will have translations and codes, it seems to be the part of wisdom to give them better than they now have.

Does any man know the whole law? Who will venture to say any one man knows even where he should look to find all? Why this difficulty? Because the fragments of the law are dispersed East, West, North and South; and worse than that—buried, and

still worse than that, the burial place itself often hidden and concealed.

Science, with industry and skill, has studied the fossil remains of animals long since vanished from the earth. It constructs models, and when the student looks he takes in all at one glance. But when it is proposed to collect the scattered parts of the legal mammoth, put them in their proper places, and show the whole for instruction, or arrange conveniently for use, there is an outcry that by so doing the law will be less understood—that the laws uncovered and brought to light can not be seen as well as they would be in the dark and under the ground.

But, as already said, codification is a necessity and we should rejoice. The true reform of the law will begin after its authoritative redaction, for then it can be comprehended accurately as a system. Trying to comprehend the law now is often like trying to conceive from patient and industrious soundings the effect of a submerged castle on a surrounding landscape also inundated.

There have been many revisions and attempted Codes in America. The work must go on. We have shown the world how to make written Constitutions, how to keep them effectively checking Legislatures and Congresses, Governors and Presidents, until they soothe and quiet, to the joy of the whole human race, that sigh of centuries: "*Quis Custodiet ipsos Custodes.*" Our Constitutions keep the keepers, guard the guards, and rule the rulers. Codification is subsequent in time and development, but it is of the same family. It is more difficult, as complex differs from simple, but is a part of the same great work. America having solved the question of self-government, subdued a wilderness of mountain, desert and forest, she is now to subdue the more stubborn wilderness of her law.

The many Codes scattered over the tract from the perished labors of Zaleucus to the last attempt in Europe, and especially the great Roman model, are to be meditated and studied, but they are not our guides. Each State must encourage the business of compilation. The Thesmothetæ, the committee who revised the statutes of Athens, examined the existing laws annually, noting contradictions and double laws. We must have official digesters of reports, statutes, and all accepted authority, and frequent revisions, and they should be kept busy until they achieve an accurate compend of the law of force. When that is completed, after some years we can make a code satisfying our needs.

It is hard to keep to the true expressions. It is now conceded

that when Sir James Mackintosh said that constitutions are not made but that they grew, he uttered simply the truth. And the same is true of laws and codes; they are not made, they grow. But every now and then we speak of them as making or made. This is the cardinal error of all that the celebrated Mr. Austin says of codification. After speaking in "abstract" (or without reference to the circumstances of a given community), and asserting that "there can be no doubt that a complete code is better than a body of judiciary law; or it is better than a body of law partly consisting of judiciary law and partly of statute law, stuck patch-wise on a body of judiciary;"<sup>1</sup> he proceeds:

"But taking the question in concrete (or with a view to the expediency of codification in this or that community), a doubt may arise. For here we must contrast the existing law (not with the *beau ideal* of possible codes, but) with that particular code which an attempt to codify would then and there engender. And that particular and practical question (as Savigny has rightly judged), will turn mainly on the answer that must be given another, namely: Are there men then and there competent to the difficult task of successful codification? of producing a code which, on the whole, would more than compensate the evil that must necessarily attend the change? The vast difficulty of successful codification no rational advocate of codification will deny or doubt. Its impossibility none of its rational opponents will venture to affirm."<sup>2</sup>

Codification being as natural as growth, this passage seems almost as absurd as if after admitting that in abstract a boy should grow, we were seriously to argue "taking the question in concrete," (that is, with a view to his particular constitution and surroundings) whether he should be permitted to grow at all. Why, he can not help growing—nor can codification be helped. Be only aidant to nature and then growth and codification will both be sound and healthy.

We have already said that the Code steals on us, perfecting itself gradually through a long series of imperfect attempts, and this Austin everywhere seems to overlook.

We have thus endeavored to make somewhat more clear our difficult theme. Whether we have succeeded or not, we are profoundly impressed that we must clearly see that decisions and statutes and codifications are brought into being by the action of

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<sup>1</sup> 2 Austin, Jurisprudence, 684.

<sup>2</sup> *Ib.*

spontaneous forces, and that they are living part and parcel of that great system, in constant evolution and dissolution, around and above and below and in us, which we term nature, before we can fully comprehend the subject, and that instead of thwarting our legislators, judges, digesters and codifiers, or substituting the emanations of the closet for their practical labors, we should apply ourselves to master legislation, judicial decision, digesting and codification, so that we may learn, as it were, not to make, but to breed them aright.

JOHN C. REED.

Lexington, Ga.

## THE PARKMAN MURDER.

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Dr. George Parkman, of Boston, was a member of a well-known Boston family bearing the same name. His brother, the Rev. Dr. Francis Parkman, was pastor of the North (Unitarian) Church on Hanover street. The subject of this article was not, himself, a regular practicing physician, but had almost abandoned his profession, but subsequently became an active purchaser and seller of real estate in small parcels. In connection with this business he also loaned money and received, in security for payment, bonds and mortgages. As a creditor he was reputed austere and exacting. Dr. John W. Webster, Professor of Chemistry, both in Harvard and at the Medical College, on Grove street, became one of his unfortunate debtors. Professor Webster lived in Cambridge, where resided his family, consisting of a wife and several daughters. In 1842, his business relations with Dr. Parkman commenced. It was this year that he borrowed \$400 and in return gave his note. Before a final adjustment of this debt, in 1847, Dr. Parkman and a few others made an additional loan to Dr. Webster, which, together with the unpaid balance, amounted to about \$427.27, and for this sum Dr. Webster bound himself by giving a mortgage on all his personal property, including household furniture and cabinet minerals. Robert G. Shaw, a brother-in-law of Dr. Parkman's, and to whom the circumstances in the agreement made in 1847 were totally unknown, became the innocent purchaser of these same minerals from Dr. Webster. Learning these facts, Dr. Parkman was greatly incensed at this breach of honor, and henceforward used, with unrelenting rigor, every means to enforce the collection of his debt. Constant demands for payment were made on Dr. Webster, with threats and intimations in case of refusal. On one occasion Dr. Parkman consulted Professor Webster's agent in the sale of tickets to the students to obtain admission to his lectures. By this means Professor Webster was accustomed to receive considerable remuneration for his professional labors at Cambridge College. So the matter stood until November 23, 1849, in the morning of which day (it being Friday), Professor Webster called at the house of Dr. Parkman, in Boston, and made an appointment with him, without the knowledge of the other members of the Parkman family, to call

on him at his medical rooms at half-past one o'clock that afternoon. This appointment was kept by Dr. Parkman, who a few minutes after the hour mentioned was seen approaching the Medical College, and he was never after that time seen again.

At dinner time Dr. Parkman did not return to his home. This incident produced some uneasiness in his family. Dr. Parkman was a very domestic man, and seldom ever absent from home even at meals without leaving his family in possession of his excuse. Evening came and the night passed, but still there were no tidings of the missing man. The family became more alarmed than ever, and the next day, Saturday, causes of their alarm were communicated to friends, none of whom were able to account for the strange disappearance. After consultation it was agreed to advertise, post bills and offer rewards for the discovery of Dr. Parkman, dead or alive. In one of the advertisements signed by Robert G. Shaw, already spoken of as his brother-in-law, a detailed account of his height, style of dress when last seen, and general personal appearance, was contained. The tenor of which indicated that he might either have destroyed himself in consequence of some sudden aberration of mind, or, as he had with him a large sum of money, may have been foully dealt with by a person or persons unknown. The officers of the law instituted thorough search. The whole west end of the city where Dr. Parkman owned much real estate, was searched everywhere and in every house from cellar to garret. The river was dredged. Nothing, however, resulted from all this thoroughness of investigation. About 4 o'clock, p. m., on Saturday, the Rev. Dr. Francis Parkman was called upon by Professor Webster, who told him that his brother, by appointment, came to his rooms in the Medical College, on the Friday before, about half-past one, at which time and place he had paid him money, \$483 and some cents. Saying also, that "he had some papers in his hand, and took one out and dashed his pen across the paper; that he left the office in great haste, going, as he supposed, to Cambridge, to cancel the mortgage, which he promised to do on receiving payment." This last intelligence tended strongly to confirm the worst apprehensions of his family, that he had been murdered for money. Rumors were afloat that he had been seen at different places in the evening, but none it seems were supported by reasonable foundation. As time waxed on and no light reflected on the mystery, the search was made more general and thorough. More as a matter of form than anything else, on Monday the Medical College was searched. The officers on present-

ing themselves at Dr. Webster's rooms found the doors locked, but on demanding admission were immediately and politely received by Professor Webster and conducted to his laboratory below. Professor Webster made no objections to their looking through his rooms, but wished that "nothing might be turned over." Every thing presented a perfectly natural appearance. One of the officers started into a small room in one of the rear apartments; Professor Webster told him to be careful, that he kept in there his combustible material and liquids, and that he might endanger his life. Whereupon the officer drew back, remarking that he did not care to "get blowed up."

In one place was a furnace, the fire of which was brightly burning. In another corner stood a large tea-chest filled, it appeared, with tan, and on top of which was a layer of minerals. Some of the officers picked these up carelessly, looked at them, and then placed them back again. The visit was not a very long one. They soon left without making any discovery calculated to excite their suspicion. Littlefield, the janitor of the College, was not quite satisfied. From foregone circumstances he felt that Professor Webster knew something about the disappearance of Dr. Parkman; and furthermore he felt that suspicion might ultimately be cast upon himself, as it was substantially reported that the last seen of Dr. Parkman was when on his way to the Medical College. Littlefield, on the 19th of November, the Monday previous to the fatal Friday, had been present at an interview between Professor Webster and Dr. Parkman. He remembered that the conversation turned very often on mortgages and money matters, and that there were some hard words. This made it evident to his mind that the two men were not upon friendly terms. Later, on the same day, Professor Webster came to him and interrogated him about a vault under the entry floor, used as a receptacle for the remains of subjects from the dissecting room; he was questioned as to its exact situation and the way of access to it, etc. By way of explanation Professor Webster told him he desired to get some gas out of the vault to try an experiment. Tuesday, the day following, he had also received a note from Professor Webster to be delivered by a trustworthy messenger into Dr. Parkman's hands. On Friday morning he made a fire in Professor Webster's furnace as usual. About a quarter before two o'clock in the evening he saw Dr. Parkman approaching the Medical College, walking very fast. He did not see him enter. His duties about that hour were in the rooms of Dr. Oliver Wendell

Holmes. Three or four times during the evening he went to the doors leading into Professor Webster's apartments, but failed each time to gain admittance, they being locked—an occurrence so seldom, that he could not help being puzzled. He imagined at one time to have heard footsteps within. After nightfall (Littlefield resided in the building) he saw Professor Webster come to the rear steps with a candle in his hand, which was immediately extinguished on getting outside. On Saturday morning Littlefield succeeded in getting in the room but could not get in a little room leading to the lower laboratory. Later in the day Littlefield made a fire in Professor Webster's furnace; he also heard Professor Webster working at various times during the day. These things were repeated on Monday and Tuesday. Littlefield discovered fire in another furnace which was hardly ever used.

All these circumstances, connected by such an unbroken link, presented to Littlefield's mind the most terrible forebodings and suspicions, so dreadful that he dare intimate them to no living being but his wife. He secretly determined to set about the discovery of Dr. Parkman's body, if it was anywhere to be found in the college building. On Friday, the 30th, he commenced the solemn and dreadful undertaking. Prof. Webster's private privy had not been entered by the officers. To the vault below the only access was from the opening above. He succeeded, after much labor, in gaining an entrance to the basin by the removal of bricks until the cavity was sufficient to admit his body, and here, in this dark and fetid chamber, he found fragments of a human body, covered with a towel marked "W," the same that Prof. Webster was accustomed to use in his laboratory. Such a revelation was astounding. He told a few particular friends about it; their surprise was indescribable. Another examination was made and resulted in further terrible revelations. In the furnace before referred to, were found, mixed and more or less fused with the slag and cinders resulting from the combustion of coal, great numbers of human bones, as well as several blocks of artificial teeth. When the tea-chest, with its tan and layer of minerals, came to be examined, it was found to contain fragments of a human body. These portions being placed in apposition with the other parts found in the vault was a human body, minus head, arms, both feet and the right leg from the knee down; a body bearing certain marked features corresponding with those of Dr. Parkman's. As such it was identified by all who knew him. But all doubt was dispelled by the testimony of the dentist who

positively testified that the false teeth found were the identical ones which he himself had made for Dr. Parkman several years before. Under these circumstances there was no other alternative but to arrest Prof. Webster for the murder of Dr. Parkman, which was accordingly agreed upon, to be done at the earliest season. The officers instantly repaired to Cambridge and found Prof. Webster. They stated to him that it was their desire to re-search his apartments and that they did not care to commence unless he was present. For which he thanked them, and signified his willingness to go with them. Prof. Webster told them that an old woman by the name of "Port," living in Cambridge, was in possession of certain facts which would be to them material assistance in finding the perpetrators of the foul deed. They deemed it best to defer this visit until some other time, and drove directly to Boston. When they passed the street leading to the college and drove up to the jail, Prof. Webster, evincing some uneasiness, asked, "what this meant?" The officer in charge replied that they would look for the body of Dr. Parkman no more; that they had found it, and to consider himself in the custody of the law charged with the murder of Dr. Parkman. Prof. Webster, at this intelligence, seemed at first but little disconcerted, but in a little while showed great nervousness and agitation. He was then conducted to the Medical College, and brought before all that remained of the body of Dr. Parkman. Here it was that his strength failed him, and the perspiration was seen to come through his clothes. He tried to drink but could not, and would have fallen to the floor, completely overcome, but for the support of the officer. He at first attempted to lay the deed to Littlefield, and then in one breath said, in an excited manner, that he did not believe that to be any more the body of Dr. Parkman than his own. Thus did this man, in trying to divert suspicion from himself, show the strongest evidence of that guilt which up to this had been locked in the dark recesses of his own soul. Suffice it to say, that these discoveries were followed by a coroner's jury, who found that the body was that of Dr. Parkman, who disappeared on the 23rd, and charging Prof. Webster with the taking of his life. The next Grand Jury brought in a bill of indictment against John W. Webster for the murder of Dr. George Parkman.

We have in an imperfect manner endeavored to bring before the mind of the reader some of the leading facts and circumstances pointing to the guilt of Prof. Webster before the trial. We will attempt from now on to adduce some able rulings of the Court, and the testimony elucidated in the trial of this wonderful case.

By Rev. Sts., ch. 136, sec. 20, the indictment was transmitted to the Supreme Court of Massachusetts at the March Term, 1850, Chief Justice Shaw and Justices Wilde, Dewey and Metcalf, presiding. On the part of the Commonwealth the case was conducted by J. H. Clifford, Attorney-General, and at his request, and by leave of the Court, G. Bennis, Esq., was associated with him. For the defendant, P. Merrick and E. D. Sohier conducted the case. The indictment contained four counts: the first alleging the crime to have been committed by stabbing with a knife; the second by a blow on the head with a hammer; the third by striking, kicking, beating and throwing on the ground, and the fourth was, "that the said John W. Webster, at Boston aforesaid, in the county of Suffolk, in a certain building known as the Medical College, there situate, on the 23rd day of November last past, in and upon the said George Parkman, feloniously, willfully and of his malice aforethought, did make an assault; and him, the said George Parkman, in some manner, and by some means, instruments and weapons, to the jurors unknown, did then and there feloniously, willfully, and of malice aforethought, deprive of life; and so the jurors, aforesaid, upon their oaths, aforesaid, to them the said jurors unknown, then and there willfully and of his malice aforethought, did kill and murder; against the peace and dignity of the Commonwealth aforesaid, and contrary to the form of the statute in such cases made and provided." The jury was composed of twelve honest and upright men, selected from four different religious denominations. The theory of the prosecution was that John W. Webster enticed Dr. George Parkman to his rooms at the Medical College on the fatal Friday evening, a time when the defendant was free from ordinary occupations and interruptions, and did then and there murder him, with intent to utterly destroy his body by fire and chemical means, being, as he considered, harassed beyond endurance by his importunate creditor, the deceased, Dr. George Parkman.

In impannelling the jury one of them stated that he was opposed to capital punishment, and as a legislator would assent to the abolishing of the statute providing for it in certain offenses, but did not believe that his views would be anything in the way of his doing his duty so long as it continued to be the law. He also stated that he had great sympathy for the prisoner and his family, and feared that this might be some cause for a bias in his mind in making up his verdict, or at least that he might indirectly influence the other jurors to swerve from their own opinions. The Court, after some

discussion, decided that this man was eligible, and accordingly he was sworn in. The jury went to the place where the crime was alleged to have been committed and made a survey of the premises. The next day the trial commenced. Littlefield, the janitor, gave his testimony which was the strongest for the prosecution and the most adverse to the defendant's cause. It was nothing more than a recapitulation of the same he established on the preliminary examination. The dentist further testified that the artificial teeth found were not only the ones he had made for Dr. Parkman several years since, but that he had reset the same teeth for the deceased a few days before his disappearance. The prosecution introduced two or three letters purporting to have been written by Prof. Webster, and addressed to one Tukey, the City Marshal of Boston. One of these letters, post marked November 26th, read as follows: "Dear Sir— You will find Dr. Parkman murdered on Brooklyn heights. Yours, M., Captain of the Dart."

Another to the same party in a light pink envelope, looking something like chemical filtering paper, was dropped in the East Cambridge post office, and read thus:

"Dr. Parkman was took  
on Bord the ship herculun  
and this al I dare to say  
as I shal be kild in  
Est Cambridge one of  
the men give me his watch  
but I was feared to  
keep it and throwed  
it in the water right side  
the road to the Cambridge  
to Bost."

Another note dated Boston, November 31, 1849, and signed "Civis," and written to Tukey, seemed to be from a friendly source, advising the best means to search for the body of Dr. Parkman, telling him to look closely in cellars, and to fire cannons by the riverside to make the body rise to the surface, if it had been thrown in there. These letters or notes being read, N. D. Gould testified that he had been acquainted with the hand-writing of Prof. Webster, for twenty years, and that these were written in the disguised hand of the prisoner. The testimony of Gould was admitted by the Court, although numerous objections were urged against its admissibility on the part of the defense.

Much evidence was introduced to prove the accused had always

borne the reputation of being a peaceable and humane man. On this point the Court ruled that it was the privilege of the accused to put his character in issue, but further said that "it behooves one charged with an atrocious crime like this of murder, to prove a high character, and, by strong evidence, to make it counter-balance a strong amount of proof on the part of the prosecution; it was manifest that the offense, if perpetrated, must have been influenced by motives not frequently operating on the human mind." Several witnesses called for the defense, testified that they saw Dr. Parkman at various places in Boston, at different times, between the hours of a quarter before two and five in the afternoon of the 23d of November. The Attorney-General called witnesses to show that there was a stranger in Boston at that time, bearing a very strong resemblance to Dr. Parkman. The Court decided that such evidence was too remote and uncertain to be admitted, although, if the body of the stranger could be brought into Court to substantiate it, it would be good. The indictment alleged that the killing was done in the Medical College between one and two o'clock, and hence, had the defense proved satisfactorily to the minds of the jury that he was seen elsewhere after those hours, an *alibi* might have been proved so totally inconsistent with the chain of circumstances established by the prosecution, as to have had great weight against the reasonableness and moral certainty of the prisoner's guilt. After some days of long and painful investigation, the Court, through Chief Justice Shaw, delivered its charge to the jury. The jury, upon retiring to their room, united in prayer to invoke the guidance of Almighty God in the performance of their awful duty. After this was done, they voted upon the three following questions consecutively :

First, Are the remains of a human body found in the Medical College, on 30th of November, 1849, those of the late Dr. George Parkman?

Second, Did Dr. George Parkman come to his death by the hands of Dr. John W. Webster, in the Medical College, on the 23d of November, 1849?

Third, Is Dr. John W. Webster guilty, as set forth in the indictment, of the willful murder of Dr. George Parkman?

On each of these points separately a vote was taken and the response of these twelve men came unanimously in the affirmative. With heavy hearts they returned to the court room with their terrible verdict of "guilty." As this word fell from the foreman's lips in slow but steady tones, the announcement upon the prisoner was

severe. The scene in the presence of the vast multitude, attracted thither by interest and curiosity, is thus described: "Even the public had expected that the jury would disagree, what must not have been *his* hopes? As the terrible answer of the foreman fell upon his ear, he started like a person shot, his hand dropped upon the rail in front; his chin drooped upon his breast; and, after remaining thus a moment or two, he sank into the chair, covering his eyes with his hands. And when the presiding Justice, in solemn but tender language, had concluded the sentence of death, the prisoner sank further back in his chair and wept. Then taking out his handkerchief, and wiping his face, he leaned forward and rested his forehead upon the bar, as if to conceal the current of his tears from the thousand eyes that were turned upon him; and in this position he remained some little time undisturbed."

His statement to the jury before retiring, was made of stumbling explanations and a presumption of his entire innocence up to the hour when sentence of death was passed upon him. Professor Webster never intimated his guilt. Before the execution of the law he made full confession of the killing of Dr. Parkman, in an appeal for Executive clemency, and commutation of his punishment. The Governor did not credit his statement that he did it under a sudden heat of passion, and not premeditatedly. All efforts to save the life of the unhappy man were futile. It was believed that he had enticed his victim, and then taken his life. Prof. Webster suffered the extreme penalty of the law. Rufus Choate was solicited to take part in the defense, but after hearing the circumstances, refused, unless the prisoner would plead guilty, and allege provocation to extenuate his crime. This was objected to both by the prisoner and his friends. Had this line of defense been adopted, it is reasonable to believe that the crime might have been reduced a grade less than murder. We do not think Prof. Webster ever confessed by what means he took the life of Dr. Parkman. The devices mentioned by DeQuincy in his "murder as a fine art," may not have been stranger nor more ingenious.

The trial and conviction of Prof. Webster excited profound attention throughout the whole country at the time. It is one of those strange events in the lives of men not readily to be forgotten. It is often talked of to this day, although twenty-five years have passed since it occurred, but very few, even lawyers who have often referred, in the course of their practice, to able rulings of the Massa-

chusetts Supreme Court, then presiding, are acquainted accurately with the facts and circumstances.

For this reason, and besides, in view of the vast and important hearings the case has had, in nearly every State, on criminal jurisprudence, we have, with some pains and no little trouble, reproduced from different sources, the material facts, contained in this article.

CHAS. J. SWIFT.

Columbus, Ga.

## LEGAL PRESUMPTIONS.

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An action is defined by Justinian—Just. lib., 4, Tit., 6,—as “*jus persequendi; in judicio, quod sibi debetur;*” which has been declared in the 4th of July oratory of the Declaration of Independence to be the “pursuit of happiness,” and may, therefore, be translated as the luxury of a law suit. It is in consequence of this intimate relation that Blackstone has defined law as “a rule of action,” and that Coke pronounces lawyers as the “guardians of liberty.”

The law endeavors, as far as possible, to become an exact science, and it therefore has adopted certain general rules as premises to be applied to the facts of all actions. But these facts must conform to certain rules of evidence, or they will not be considered. For the whole facts might destroy the law suit.

But while the law is thus jealous of facts, it will sometimes, in order to avoid uncertainty, supply them by a presumption, and it is with these we have to deal.

A presumption is an inference which the law makes in the absence of evidence. They are of two sorts—legal and natural, 4 Greenl., 270, and, of course, the legal is never the natural.

A natural presumption may be rebutted by proof, but a legal presumption is not open for proof, and will stand in spite of all the evidence in creation.

A natural presumption depends for belief upon the previous connection of the facts, and therefore it is that husband and wife are not allowed to testify against or for each other: 2 Hawk., P. C., 431.

While the legal presumption is that they are one person, and therefore she may testify as to his assault upon her. Because this is rather a confession of the defendant himself: Bl. Com., 1, 443.

Legal presumptions are divided into those of law and of fact. It is, for instance, a presumption of law that when a party sells the fee-simple absolute to his land, he has parted with it forever. And therefore when land is so sold to a corporation, which afterwards dissolves, the party who sold the land shall enjoy his own again: Co. Lit., 13; 5 Hum., 38; Bl. Com., 1, 484.

Again, it is a presumption of law that a child born nine months after the death of the husband is his heir. And there is also a maxim that *heres est quem nuptiæ demonstrant*. Therefore, when a man dies, and his widow marries again, and a child is born in such time, as by the course of nature, it might have been the child of either husband, he may inherit to either father he chooses, or perhaps to both: Bl. Com., 1, 457; Co. Lit., 8.

This is the true explanation of a "fee with a double aspect;" which is the exact reverse of the following case:

Before the process of legal evolution had freed the body of the law from the embarrassments of tails, it was the rule that in case of a female tail a male should never inherit, and *e converso*. So that if a man hath two estates tail—one in tail male, and the other in tail female; and he hath issue a daughter, who hath a son; this grandson shall inherit neither of the estates: Co. Lit., 25; Bl. Com., 2, 114.

In another case, a slave is presumed to be the property of his master, and therefore absolutely incapable of owning any property whatever: Bou. Law Dic. Tit. Bl. Com., 1, 424.

This being the legal presumption which allows no refutation, therefore it is that a slave shall own, absolutely free from his master, whatever *salvage* he may earn: *Small v. Good, &c.*, 2 Pet., Adm'r, 284, 287; *Mason v. Ship Blaireau*, 2 Cranch, 240; *Par. Ship. and Ad. B.*, 2, 301.

It is also a legal presumption that every man intends the consequences of his acts: Plowd., 140.

And therefore if a man marries a woman of notoriously bad temper he can not obtain a divorce on this ground: Co. Lit., 756.

Again, it is presumed by the sapiency of the law that contracts in restraint of trade are void; and therefore it was that the learned judge in the case of *Dier* (Year Book, 2 Hen., 5, Fo., 5, pl. 26, 1415), forcibly remarked in his opinion, that not only would a demurrer have been sustained, but that if the plaintiff were there "by G——d he should pay a fine to the King."

It is the presumption of law that the Court is the counsel for the prisoner in all criminal trials: 3 Ins., 137; Bl. Com., 4, 355.

And this affords Fortescue, C., 44, and Sir Edward Coke, 1 Inst., 88, an ample opportunity for triumph. They affirming this to be "*quasi agnum committere lupo, ad devorandum.*" Bl. Com., 1, 462.

A natural presumption on the other hand depending upon experience, is open to rebuttal. Such, for instance, is the rule that persons proved to have been living will be presumed to be alive till proved to be dead: 2 East, 312; 2 Rollis R., 461.

And therefore Moses and Enoch could take under a deed at this day.

But the children, if any, by the second marriage of their wives are certainly legitimate. For there is another presumption that when a man has not been heard from for a long time, the law will kill him anyhow, and his wife may marry. This is out of the tender consideration which our law hath for the female sex. *In jactorem vitæ*: Bl. Com., 1, 444; 3 Bro. C. C., 510.

The natural presumption is that if one man feloniously takes the property of another, he has committed a theft. But this is a case where the law will allow of evidence. For if the property be a dog, it has no intrinsic value at the common law and can not be the subject of larceny: Bl. Com., 4, 436.

But *quære* whether a cat is not recognized as the subject of property? as at common law they are reclaimed and may serve for food: Bl. Com., 4, 235; *Pension Francais, Passim*.

And to kill the Prince's cat is a misdemeanor: Bl. Com., 1.

But in these cases a terrier may be admitted in evidence: 1 Gr. Ev., sec. 496.

This is a grasp among the heaped eccentricities of legal presumptions, and odd enough some of them do appear, we must confess.

But let not the profane reader imagine we intend aught of profanity or sacrilege toward the high and holy mysteries of the law.

These facts are but as the swallows which perch upon the immortal columns of the Parthenon; a summer's song among the relics of the eternal past.

And we can not close our short article more appropriately than with the advice of the wise Gargantua to his son, Pantagruel: "As for the law, of that I would have thee to know the texts by heart, and then to confer them with Philosophy."

GEO. R. PHELAN.

Memphis, Tenn.

## *Executions by Separate Creditors Against the Joint Effects of the Partnership.*

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One of the most difficult questions in the law of partnership is as to the manner in which its property is to be dealt with under executions against the individual partners. In the case of *Haskins & Reynolds vs. Everett*, 4 Sneed, 531, the jury was instructed by the Circuit Judge that the officer having such an execution, might seize upon and sell the property of the partnership, and that the purchaser at his sale acquired the right to its possession as against the partnership.

The question arose in an action of replevin by the partners after the sale, against the purchaser, in which, under this instruction, they, of course, failed, and on appeal by them to the Supreme Court, the judgment below was affirmed as being "in all things right." The only remedy left to the injured partner, according to the opinion in the case, is the expensive and tedious proceeding by a bill in equity, to have an account taken of the partnership business, in order that the equities of the members as between themselves might be adjusted, and the interest of the indebted partner and of the purchaser, which would of course be equivalent, ascertained, the latter in the meantime remaining in possession of the property.

The opinion is brief; and, without argument or authority, assumes two propositions as law: First, that the officer who levies upon the interest of a partner in the partnership property not only seizes the whole of the property, but dispossesses the other partners, and, on the sale, delivers the possession to his vendee; and secondly, that such vendee is entitled to hold such possession as against the partnership as well as against each and all of its members.

If this be the law, it will be at once seen that its consequences may be of the most serious character. For not only may the business of the partnership be brought to a sudden end by the seizure of its property for the private debt of one of its members, of which the others may have been entirely ignorant, but no security whatever is given them that, at the end of a long law suit in which it may be shown that the indebted partner really had no interest in the property, the purchaser will be able to return it or account for its value. And thus they may be involved in ruin, not only by the

premature stoppage of the partnership business, but arise from the want of the vency of the purchaser; or they may be so baffled in the last by his removal with the property into some foreign jurisdiction, but make it not worth pursuing; or it may be that the articles of partnership may be so numerous, and each of so small value, that proceedings in equity would be wholly impracticable; as, for instance, a stock of merchandise sold in parcels to a thousand purchasers residing in different parts of the country, and many of whom may be insolvent. And thus too it may happen, that the whole of a numerous partnership may be brought into bankruptcy by the indebtedness of one of its members, as one weak column may bring destruction upon the whole edifice.

Is this to be accepted as the settled law of Tennessee, and if so, is it sustained by reason and the weight of authority?

The case is certainly not in harmony with the text books. The views taken of the question by Parsons, whose *Treatise on the Law of Partnership* is the latest we have, seem to us so sensible and practical that we must be excused for quoting them somewhat at length. In his chapter upon the remedies of third persons against the partnership and against the partners, he says that "in the days of Salkeld and Lord Raymond, one hundred and fifty years ago, the extreme inadequacy and incompleteness of the law of partnership are proved by the fact that a creditor of a partner got at once, by execution, the share of the indebted partner in the partnership property. If there were two partners, a creditor of one got judgment and execution against him, and levied it upon the partnership property, of which the sheriff sold one-half. If there were three, he sold one-third; if four, one-quarter. The progress of the change is not very distinctly exhibited in the reports; but it began early and it has long since been the well-established rule and practice that no private creditor of a partner could take, by his execution, anything more than that partner's share in whatever surplus remained after the partnership effects had paid the partnership debts."

"There are," says he, "two entirely distinct and, indeed, opposite ways of viewing a commercial partnership. One of them regards it as a modified tenancy in common; the other regards it as a modified corporation. It is certain that a partnership is neither a tenancy in common nor a corporation; and it is equally certain that it has some of the attributes and qualities of each of these forms of joint ownership. The question which lies at the bottom of the difficulties presented by our topic seems to us to be this:

tion of a partnership as "a body by itself, having its own creditors and its own effects."

"What then," he goes on to say, "is the right or interest or property of a partner to or in the effects of the partnership? Certainly not a separate and exclusive right to any part or portion of it; or any right of any kind to any one part rather than to any other part; or any other right or interest than that which all the other partners have. It follows, therefore, that he can have no right or interest which is such in kind or in degree as prevents all or any of his co-partners from having precisely the same; and the right which he has is precisely the same as theirs in reference to the whole and every part of the property. We can not, therefore, define the right of any one partner better than we have already done by calling it an ownership of all the property of the firm, subject to the ownership of the co-partners who hold it subject to his ownership.

"The partner who desires to separate his share of the common property and own it free from any liability to others or any interest in others, must settle the concerns of the partnership, in the first place, so as to be sure that the debts are paid or provided for; and then he may call for a division and take his share to himself.  
\* \* \* \* \* This is, practically speaking, the whole of his right. And this, and only this, is the right which his private creditor can acquire by attachment or execution.

"The creditor may, therefore, attach the interest of the debtor partner in the partnership property. This is universally admitted. But can he attach the very goods of the partnership? Or, to state the question more accurately, can the officer having the writ, attach any definite portion of the goods and sell them to satisfy it? There is much diversity of opinion on this subject; but we are unable to regard it as at all doubtful on principle; that is, the conclusion to which the principles applicable to the case lead,

seems to us inevitable. If there be any doubt it must arise from the inability of the law of partnership to clear itself of the last remaining influence of the old notion that partnership was but one form of tenancy in common. The partner himself is wholly without the right (unless by agreement) of appropriating to himself in severalty any thing whatever which belongs to the common stock. All the partners together can not do it, if it be needed for the payment of debts. This is universally conceded. If a private creditor of a partner attaches his interest in any form, his attachment is certainly avoided by the insufficiency of the joint assets to pay the joint debts. How then can it be held either that the partner, before settlement of the debts and a division of the property, may, by his own act, make some portion of it his own; or that the partner himself has no such right, but that his private creditor may say the partner has such right and may possess himself of it by attachment or levy on execution? The courts which have in recent times permitted a sheriff to attach the property of a firm in a suit against a partner and sell the same on execution, hold also that he must not pay this over to the plaintiff, but must hold the proceeds subject to an account with the firm to be paid to them for their creditors if needed for debts, or for the other partners if it belongs to them on the settlement. Or else, that the purchaser takes the property as tenant in common with the other partners, and subject to an account between the partners, which, if it eventuate against him, will make his purchase give him nothing. This is an acknowledgment that the partner holds his interest in the joint property on terms and conditions which make it unreasonable to subject that property itself to attachment as his property. We should say, therefore, that there is no general rule of the law of partnership which rests on stronger reason than that a private creditor can not do this. We have no doubt that this interest of the partner may be attached as well as any other interest or property and levied upon and sold to satisfy a judgment. The manner in which this is done must depend somewhat upon local statutory provisions. In general, an officer ordered to attach this interest would do so by endorsing such attachment on his writ; he should certainly then give immediate notice to the debtor, and it would be expedient and proper to give such notice to the other partners. This interest would remain under attachment. We think that the firm could go on dealing as before, buying and selling and delivering goods; because this attachment did not take effect upon

any specific interest in any specific goods, but on the interest of the partner in the partnership concern.

“So affairs might go on until judgment was obtained and execution issued. For if not, it would be in the power of any person, by mere suit and allegation of a demand against a partner, to arrest the whole business of a partnership more effectually than he could do it by an allegation of a debt against the partnership itself. When execution issued the sheriff would sell the interest of the partner in the partnership in the same manner in which he would sell any other interest or right which he levied upon—as a right to redeem or the like—and the proceeds would be appropriated to satisfy the execution.”

Some of these suggestions, though to our mind exceedingly pertinent and sensible, would have excited the surprise of the lawyers who lived before the days of Lord Mansfield, and would probably have been the subject of derision in Westminster Hall. The answer would have been at once, that when the interest of a tenant in common in property was seized and sold under an execution against him, the law gave the right of possession of the whole property to the purchaser, and as partners were only tenants in common, the same rule must necessarily be followed as to them. But since that age partnerships, like all the other legal relations of life, have come to be viewed in a somewhat different light, and such an argument would now be hardly entertained in our enlightened courts. Certain it is, that a different idea of a partnership is now universally entertained, however much some of the judicial tribunals of this country might be inclined to yield to argument upon this subject drawn from the *analogy* of partnership to tenancy in common; and aside from the reported cases, it would seem that the most eminent authorities refuse to concede any force even to the argument from analogy.

What Judge Story thought upon the subject is shown by what he says in his Commentaries on Equity Jurisprudence. “It is well-known,” says he, “that at law, an execution for a separate debt of one of the partners may be levied upon the joint property of the partnership. In such a case, however, the judgment creditor can levy, not the moiety or undivided share of the debtor in the property as if there were no debts of the partnership or lien on the same for the balance due the other partners, but he can levy the interest only of the judgment debtor, if any, in the property which the judgment debtor would have upon the final settlement of all

the accounts of the partnership. When, therefore, the sheriff seizes such property upon an execution, he seizes only such undivided and unascertained interest; and if he sells under the execution, the sale conveys nothing more to the vendee, who thereby becomes nothing more than a tenant in common substituted to the rights and interests of the judgment debtor, in the property seized. *In truth, the sale does not transfer any part of the joint property to the vendee, so as to entitle him to take it from the other partners, for that would be to place him in a better situation than the partner himself. But it gives him properly a right in equity to call for an account and thus to entitle himself to the interest of the partner in the property which shall, upon such settlement, be ascertained to exist."* § 626.

Several of the Courts in this country in which the question has been presented, have arrived at the same conclusion as the authors from whom we have quoted. In *Deal vs. Bogue*, 20 Penn. State R., 233, which was an action of trespass against the sheriff for seizing, selling and delivering to his vendee the partnership goods under an execution against one of the partners, it was determined by the Supreme Court of that State that a purchaser at a sheriff's sale of a partner's interest becomes a tenant in common with the other partners *so far only as to entitle him to an account* and that "a levy to affect the interest of a partner can not touch a specific proportion of the goods, nor the whole, because others have property in every part as well as in the whole, coupled with a right, resting in contract, to use them for the purposes for which the partnership was instituted." It was, therefore, held that the action was well brought.

It will be observed that this decision accords exactly with the opinion of Judge Story as quoted above. It goes upon the idea as expressed by him that "the sale does not transfer any part of the joint property to the vendee so as to entitle him to take it from the other partners, for that would be to place him in a better situation than the partner himself, but gives him properly a right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property which shall, upon such settlement, be ascertained to exist."

This view of the subject has been steadily adhered to by that Court, and in several subsequent cases, it has been decided that the purchaser at a sheriff's sale of the interest of a member of the firm in its personal property, acquires thereby no right to the possession of the specific chattels, the remaining partners being entitled to the

exclusive possession, and that such a purchaser is only a *quasi* tenant in common with the other partners, so far as to entitle him to an account, but has nothing to do with the settlement of the partnership concerns, that being the right and duty of the remaining partners; for which purpose they are entitled to the possession of the firm property: *Reinheimer vs. Hemingway*, 35 Penn. S., 432; *Lothrop vs. Wightman*, 41 Penn. S., 297; *Smith vs. Emerson*, 43 Penn. S., 456.

The earlier cases in New York also expressly decide that the officer, with an execution against one partner, can not seize the effects of the partnership so as to deprive the other partners of their possession. In the matter of *Smith*, 16 John. Rep., 102, the goods of a firm were seized by virtue of an attachment against one of the partners. It was thereupon moved that the property be restored to the partnership. The Supreme Court of that State ordered this to be done, holding that where an execution issues for the separate debt of one partner the creditor takes it in the same manner as the debtor himself had it and subject to the rights of the other partner. "The sheriff, therefore, does not seize the partnership effects themselves," say the Court, "for the other partner has a right to retain them for the payment of the partnership debts." And considering an attachment as analogous to an execution, the Court thought the sheriff had no authority under it to take the goods from the possession of the partnership. And this case was followed in *Crane vs. French*, 1 Wend., 311, in which it was also held that the sheriff under an execution against one of the partners can levy upon and sell only the interest of the defendant in the partnership goods but can not deprive the other partner of the possession nor deliver the goods to the purchaser.

The same law and practice have long been established in New Hampshire. In a long list of cases, commencing with *Gibson vs. Stevens*, 7 N. H. R., 352, and *Morrison vs. Blodgett*, 8 N. H. R., 238, and running down to *Garvin vs. Paul*, 47 N. H. R., 158, the Supreme Court of that State has steadily adhered to the rule, not only that the sheriff can not deliver the partnership property to the execution purchaser, but can not even seize it so as to exclude the other partners from its possession under an execution against one of the partners for his private debt.

The same opinion, at least as to the right of the purchaser to the possession of the partnership property, whatever may be the duty or right of the officer to seize it in making his levy, seems to have been

entertained by Nelson, J., in the Supreme Court of the United States, in the case of *Clagett vs. Kilbourne*, 1 Black, 349, involving the question of the title of the purchaser at a sale of partnership property, made under an execution against one of the partners. "We do not deny," says the learned Judge, "but that the execution may be levied on the joint property with the view of reaching the undivided interest of the judgment debtor; but in such case the levy is not upon his individual share as if there were no debts of the partnership or lien on the same for the balance due the other partners. It is upon the interest only of the judgment debtor, if any, after the payment of the partnership debts and other charges thereon. The purchaser takes the same interest in the property which the judgment debtor would have upon a final adjustment of all the accounts of the partnership. It is not only an undivided but an unascertained interest, and the purchaser is substituted to the rights and interest of the judgment debtor in the property sold. Neither does the sale transfer any of the joint property to the purchaser so as to enable him to take it from the other partners, for that would be to place him in a better situation than the partner (judgment debtor) himself. The remedy of the purchaser is to go into equity, and call for an account, and thus entitle himself to the interest of the judgment debtor, if any, after the settlement of the partnership liabilities."

Such, too, is the law in Louisiana: *Marston vs. Dewberry*, 21 La. An., 518, from which it may be inferred that the practice under the civil law in such cases is in accordance with the authorities and cases from which we have quoted. And even in the State of New York, where they profess to have discarded the practice as it was at first begun under the cases in 16 John., and 1 Wend., it has been recently held that under an execution against a special partner in a limited partnership the sheriff can not seize and sell the partnership effects for reasons which it would seem apply as well to the case of a general partner. "As special partners," says the Judge, "can not interfere with the property or take control from the general partners, it follows that the sheriff on an execution has no such power. He can not, on an execution against such partner, do anything with the partnership property that the special partner could not do. He would, therefore, have no authority to take from the general partner the partnership property for the purpose of selling the special interest of the special partner in the property and assets of the firm; nor could he in the case of other partner-

ships sell the interest of one partner in the property of the firm and deliver the property, in which such interest is sold, to the purchaser:" *Harris vs. Murray*, 28 N. Y., 574. If the power of the officer under the execution is to be measured by that of the partner, as seems to be assumed in this opinion, then it is clear that he could no more seize the partnership property under an execution against the individual partner in a general partnership for his private debt than in the case of the partner in the limited partnership; for it is well settled that the former can not appropriate the partnership effects to the payment of his private debt, and that any attempt to do so would be void as against the partnership or the other members. Nor can we well see how any doctrine different from that of the authorities quoted can be reconciled with the decision in the case of *Johnson vs. King*, 6 Hum., 233, that an execution creditor of one member of a partnership is not entitled to a judgment upon a garnishment served upon a debtor of the partnership. The reason given in the case is, that the debt belongs to, and is assets of, the partnership, primarily liable to partnership debts, and if a judgment were given at law upon the garnishment proceeding against the debtor to the partnership to satisfy the separate liability of one of the partners, it would unjustly abstract a portion of the fund primarily belonging to the objects and purposes and creditors of the concern. And because in such a case nothing can be done but to give or refuse judgment, the Court having no power to impound the debt until, by the adjustment of all the partnership affairs, it shall appear whether the separate debtor of the execution creditor has any interest in the general surplus or in the particular debt so impounded.

Now, according to all the authorities, attachments and executions are analogous proceedings and the practice under them are regulated by the same rules. The attachment in this case was levied upon money belonging to the partnership in the hands of a third person, its debtor; for that was the effect of the garnishment. How is such levy substantially different from the levy of an execution upon its goods and chattels? And what reason is given in the opinion of the Court for not requiring the payment of this money to the creditor of one of the partners, which would not apply with equal force to the case of an execution levied upon its more tangible property? Consistency would require that, if in the latter case the goods of the partnership are to be seized and delivered to the purchaser to keep and enjoy until, by a tedious proceeding in Chancery, it can

be ascertained what interests, if any, he had acquired in them by his purchase, the debtor of the partnership when garnisheed should be required to pay the debt which he owes to the partnership to the creditor of the indebted partner to be kept by him upon the same conditions.

The authorities upon this vexed question to which we have thus referred, and from which we have copiously quoted, are certainly entitled to very high consideration, and were they unopposed would, perhaps, be accepted as conclusive of the law upon the point, for the course which they adopt and enforce, seems so just and reasonable when we look to the consequences of any other course, as at once to commend itself to approval. But aside from the irreparable injury which must necessarily ensue to innocent parties from the forcible seizure and sale of their property, and the delivery of it to the purchaser, under an execution for a debt for which they are in no wise responsible, we think that strong legal reasons may be adduced to show why this should not be done.

It is not to be denied that in ordinary cases of tenancy in common an execution against one of the tenants must be levied upon the common property by its seizure and delivery to the execution purchaser, regardless of the injury which may be done to the other tenants; and this, although it may deprive them of their actual possession and of all control over it, and may probably result in a total loss to them of their interests, for, whatever may be the practical injustice of such a course, it has been too long established and acted upon to be now changed except by legislation.

The universal argument with those, both of our day and of past ages, who have maintained that the partnership or the solvent partners should be deprived of the possession of the partnership property for the sake of securing the debt of the insolvent or indebted partner, is, that the partners are either tenants in common, of the partnership property, or own it in a manner so analogous, that it must be dealt with under executions for private debts precisely in the same manner. But that they are not strictly tenants in common, all will now admit. Is there, then, such an analogy between the two as to the tenure of property that we must necessarily import into the law of partnership a rule seemingly so unreasonable as that which exists in the case of joint tenancy and tenancy in common? For, as we see from the authorities above quoted, it has by no means become an established principle of that law, and we apprehend, has been sometimes followed in recent times only "from the

inability of the law of partnership to clear itself of the last remaining influence of the old notion that partnership was but one form of tenancy in common." That there is, however, the widest distinction, both theoretically and practically, between the two, can admit of no dispute.

Tenants in common are defined by Blackstone to be "such as hold by several and distinct titles, but by unity of possession, because none knoweth his own severally, and therefore, they all occupy promiscuously. This tenancy, therefore, happens where there is a unity of possession, but, perhaps, an entire disunion of interest, of title and of time."

This explanation of a tenancy in common, by itself, conveys to the mind no idea of a partnership in the sense in which we are treating of it, and does not, indeed, enter into its definition which is generally given as "a combination by two or more persons of capital, labor or skill, for the purpose of business for their common benefit." It is true that when this combination is of capital, the partnership possesses the element of community of property in common with such a tenancy, but in all other respects the two things are as different as any two subjects with which the law has to deal—so distinct, indeed, that they belong to entirely distinct branches of the law, the law of the one reflecting but little, if any, light upon that of the other.

The two relations rest upon entirely different foundations. The very definition of a partnership implies an agreement or contract between the parties who compose it, and the doctrine of *delectus personarum*, has been ever held as one of its most inviolable rights, so that neither, by his own act, nor by the act of the law, can one become a member of a partnership against its will, nor indeed, without its choice, that he should be thus associated and its agreement to that effect either express or implied. But choice has nothing whatever to do, necessarily, with a tenancy in common, which arises often from accident and between persons who are strangers, without contract and without any common interest, or object or benefit in view.

This element of contract alone, as it would seem to us, would be sufficient to justify the distinction for which we are contending, between the manner of dealing with the property of such tenants, and of a partnership, under an execution against the individual tenant, and one against a partner for his several debt. For besides what is embraced in the express contract of those who enter into a

partnership, the law implies and imposes upon them a further contract, that the common property shall not be withdrawn or used otherwise than as partnership property either during its existence or after its dissolution, until all its debts shall have been paid, its liabilities of every kind fully discharged and its business, so far as it may be necessary to continue it for this purpose, concluded; and this contract continues operative even after the technical dissolution by the sale of the partner's interest under the execution, for, as said by Lord Eldon, 1 Swanston, 480, in such case "the partnership is considered in one sense as determined, but in a sense also, continued—that is, continued until its affairs are settled," which language is almost repeated by Chancellor Kent, who, speaking of the effect of a dissolution, says: "But until the purpose of finishing the prior concerns be accomplished, the partnership may be said to continue:" 3 Kent's Com., 63.

From this implied and inseparable ingredient of every partnership in which there is property, springs also, as we suppose, the lien given to all its members upon such property which entitles them to have it applied to the payment of the partnership liabilities in exoneration of themselves from personal liability, a doctrine which though at one time treated as peculiarly belonging to equity jurisprudence is now well recognized and practically applied in Courts of law; as when, for instance, two executions, one against the partnership and the other against one of the partners, are levied upon the partnership property, the Court orders the one against the partnership to be first satisfied out of the fund arising from the sale of the property.

Now this right to insist that the firm assets and property shall not be withdrawn until all its debts shall have been paid, which springs into existence the moment the partnership is formed, constitutes one of the most important features of partnerships, and, as a protection to the members, is invaluable. But if under an execution against one of them this property can be seized, sold and given over to the purchaser, of what avail is the right? And what becomes of this implied lien which, though a creature of equity, is now recognized and respected in courts of law as well as in equity? How can the solvent partner be deprived of this advantage by an execution for a debt which probably had no existence when this right accrued? What has he done to forfeit this prior claim that the partnership property shall be, first of all, applied to the payment of the joint debts? True, he may proceed in equity to enforce

this right. But what in the meantime becomes of the property, or what assurance has he that at the end of the litigation he will not find the property wasted and the purchaser insolvent? It may be said that if he has reason to apprehend danger of this kind, he may procure an injunction or have the property put into the hands of a receiver. But the former remedy, as experience teaches, would be a very uncertain protection, and the latter would be perhaps requiring the settlement of the complicated affairs of the partnership by one wholly unacquainted with its business. But why should he be driven to make this application instead of the purchaser who has voluntarily put himself in that position? No blame can attach to him for the non-payment of the debt, and it would seem nothing but fair that the purchaser should follow up his purchase with all such steps as might be necessary to ascertain the value of his speculation and make it available, instead of being put into a position to compel others to do it for him.

So too if we follow up the analogy between tenancy in common and partnership and measure the powers of the officer and the rights of his vendee under an execution against the individual partner for his private debt by the law of tenancy in common, how comes it that for the private debt of the partner, the officer can not levy upon a moiety or upon any specific part of the partnership goods? Such is certainly not the law of tenancies in common. For as to them there is no question but that the officer with an execution against one may single out and levy upon and seize any one article though it may constitute but a very small proportion of the common property. But this he can not do as to partnership effects. As to them he must make his levy not upon the *corpus* of the property, but upon the partner's interest in the whole, and he must levy upon that interest *in solido*. For, by all the authorities, if he levy upon and sell the property and not the interest of the partner, he is a trespasser and can be sued as such. He can not levy upon a half, or a third, or upon any fractional part of the partnership property, nor upon the interest of the partner in any fractional part; the reason for which, as generally given in the books, is, "that if he seize but a moiety the other will have a right to a moiety of that moiety; but he must seize the whole and sell a moiety thereof undivided:" Coll. on Part., § 822; *Atwood vs. Meredith*, 37 Miss., 635; *Morrison vs. Blodgett*, 8 N. H., 238; *Waddell vs. Cook*, 2 Hill, 47; *Pitman vs. Robicheau*, 14 La. Ann., 108. But a better reason, we should think, is that it would be impossible to ascertain the interest

of the partner in any one or in any number of the articles of partnership property less than the whole.

Even the community of property which exists in partnership is a very different kind of community from that which exists in a tenancy in common, although it is the only element or feature common to the two which is supposed to give them so near a resemblance. In a partnership each partner is clothed with authority to sell any part or even the whole of its effects, or the whole interest of his firm in any one or in any number of articles of its property, in the course of the partnership business. He may, indeed, dispose of the whole property to pay the debts of the partnership by sale or assignment, provided he do so honestly and fairly. A mere tenancy in common of course confers no such authority. The tenant in common can dispose only of his undivided interest, and any attempt to control the interest of his co-tenant without express authority, would be futile. The relation, therefore, in which the partner stands to his co-partners, and to the joint property and the rights and powers over the latter growing out of that relation, are widely different from those which exist in a tenancy in common. The interest too, which, in point of ownership as a partner he has in the property, is altogether different in being wholly uncertain. He may know that after all the debts of the partnership are paid and all balances between the partners adjusted, he will own an interest in what balance, if any, may remain. But he can not say that he owns one-half or one-third, or any definite part of the property; and to ascertain his interest he must await the result of a final settlement which may strip him of every dollar he may have contributed. Not so, however, with a tenancy in common in which each owner's interest is fixed from the beginning and depends upon no such contingencies. Such an uncertainty as to the extent of the ownership of a single partner, and the doubt indeed which may in many cases exist whether he has any real interest whatever in the property of his partnership, certainly constitutes a very material difference between his case and that of a tenant in common, and, as it would seem, is enough of itself to answer the argument from analogy for conformity in the mode of dealing with common property under executions against them. And this we find to be the opinion of some of the most enlightened jurists. Judge Story, in allusion to the subject, after drawing a distinction between a tenancy in common and a partnership, showing that in the former each owner has a separate and distinct though an undivided interest—the

whole of an undivided moiety, and not an undivided moiety of the whole property, whereas in a partnership the partners are the joint owners of the whole property, goes on to say that "the true nature and extent of the rights and interests of partners in the partnership capital, stock, funds and effects is therefore to be ascertained by the doctrines of the law applicable to that relation and not by the mere analogies furnished by joint tenancy or tenancy in common." And to the same effect is the observation of Mr. Parsons that "the supposed analogies between the law of partnership and other branches of the law, if they sometimes afford ample illustration, lead to confusion and error when we attempt to carry them far; or, by their help, deduce from other departments a rule which may control and determine a question of partnership."

The truth is that the interest which a partner has in the partnership property is peculiar, and can be hardly compared to any other ownership known to the law. It is wholly unlike a joint tenancy in lacking the unities which are essential to constitute that species of ownership in common; and survivorship—the *jus accrescendi*, as it is understood in joint tenancies, has no place in partnerships; and, as with tenancy in common, it bears resemblance to joint tenancy only in the one point of community of property. But even in this there is but a resemblance; for whilst in joint tenancies and tenancies in common, the extent of the ownership of each tenant is ascertained, in partnerships, as we have seen, the interest of each partner is entirely uncertain and can be ascertained only by the winding up and adjustment of all its affairs. So that they can be said to be alike in this only, that no one individual is the sole or exclusive owner of the property.

There is, however, a survivorship of title in partnership upon its dissolution by the death of one of the partners, not in the sense in which it is understood in joint tenancy, but for the purpose of selling or otherwise disposing of its effects for the payment of its debts; and this constitutes, it may be observed, another difference between tenancy in common and partnership. The executor or administrator of the deceased partner is said to be a tenant in common with the survivor; but the surviving partner is invested with the exclusive right of possession and management of the whole partnership business for the purpose of winding it up, and all suits for the collection of its assets must, at common law, be in his name, and the executor or administrator can not be joined. And not only is the survivor entitled to the possession, but he has the exclusive

legal right to the partnership effects, which, however, he holds as trustee for the creditors and the personal representatives of the deceased: *Case vs. Abel*, 1 Paige, 398; *Egbert vs. Wood*, 3 Paige, 525; 3 Kent's Com., 64; Parsons on Part., 440. So that the partnership, in such a case, as has been previously said, in a sense continues.

We should suppose, therefore, that it would not be competent for the executor or administrator of a deceased partner who had come into the possession of the partnership effects to plead the tenancy in common in a suit for them by the surviving partner; and hence it would appear that it is not in every possessory action by one tenant in common against another that this defense can be made; and the exception is in this very case of partnership. The truth is that, in the language of the Pennsylvania cases, the executor or administrator is only a *quasi* tenant in common—that is, so far and so far only as to be entitled to an account. And this right to the exclusive possession and management of the partnership business with a view to its speedy and final settlement, is, no doubt, based upon the policy of the law, the supposition being that he is more conversant with the affairs of the partnership, and, therefore, more competent to manage them than a stranger could possibly be, besides having the better right to demand it for his own protection. Now, we would ask what better right can the creditor have to the exclusive possession of the partnership property than the executor or administrator of the deceased partner? Or why should he be viewed with more favor when his interests conflict with those of the solvent partner? And what difference can it make whether the dissolution is caused by death or by the sale under execution of the partner's interest?

Besides, as argued by Parsons, a partnership is something more than a joint ownership of property, and there is certainly something about it distinct from the persons of the partners—something in the idea distinct from its property and the persons who compose it. Take, for instance, a commercial partnership. It treats and negotiates with others as a partnership and not as so many separate persons. It contracts and is contracted with as a body. Credit is given to it as such. It has its distinctive name. It carries on its business as a unit though there may be an hundred partners. It has its good-will, its customers, its agents, its property. It has its debts which are, both at law and in equity, to be paid out of its assets to the exclusion of the creditors of the individual partners. Its written contracts must be signed with the partnership name to be binding upon it as a partnership. It has its locality regardless

of the residence of its members. It owns its property as a unit and not as a plurality of persons as in joint tenancies and tenancies in common. It may even be appointed and act as trustee or executor or guardian. And this idea of individuality, if not fully recognized in the law, is at least the commercial sense of the word.

We do not mean to say that it is a *quasi* corporation. The two things are radically different. A partnership is not an ideal creature of the law, having a fictitious existence, totally distinct from those who own its capital stock, endowed with personal capacity, with shareholders irresponsible for its debts, and with power from its very nature and constitution to act only through agents, and continuing the same, notwithstanding changes of the individuals who compose it. On the contrary, it is the creature of contract with unlimited responsibility upon its members, each of whom is not only its agent, but a security for the payment of its debts. Still, they both consist of a number of individuals whose capital is united for certain purposes, to be accomplished for the joint benefit, each governed by laws peculiar to itself, so that a partnership seems in fact to be, what the commercial world considers it, a body aggregate though not a body corporate as the latter words are understood.

It might be going too far to say that a partnership should be considered in all cases a unit, distinct from the persons of its members, but it would seem to be going too far in the other direction to view it as nothing more than the several persons who compose it. It is not so treated in the commercial world, nor in all cases in courts of law, nor is it so in fact, and we see no reason why this doctrine of severalty in partnership should be adhered to in any case where plain justice requires a different course to be taken. In England the difficulty has been overcome as to their joint stock companies, which, unless possessing privileges under a royal charter or some act of Parliament, are nothing more than modified partnerships, by giving them a corporate character, not, however, as corporations, but as something more nearly approaching them than common partnerships, and we can see no reason why the old notions of a century ago in regard to ordinary partnerships may not be, to some extent, modified in the same way.

It would, therefore, seem that to deal with a partnership in legal proceedings as if we were dealing with the several individuals who compose its members, is to mistake its true character, and that, however it may have been viewed in the days of black-letter law when new and undeveloped, we should, in this day of great commercial

progress, when not only commerce, but many of the greatest enterprises in other fields are being conducted by combinations of individuals and property in partnerships, look at them in a different light and apply to them a somewhat different law.

We are, therefore, constrained to think that the right of the purchaser of the partner's interest in the partnership effects under an execution against him for his private debt to claim the possession of those effects to the exclusion of the other partner and the correlative duty of the officer to give such possession to him, which is the first proposition laid down in *Huskins vs. Everett*, can be supported neither by analogy, by reason, nor upon principle, and that but for the support which it is supposed to receive from the old cases, based upon the now antiquated notion of the character of partnership, such a proposition would hardly be entertained for serious consideration.

But if we had been in doubt upon the question after weighing the reasons and authorities which we have given, the difficulty would have been removed by what seems to be the unanimous conclusion of the more modern English Courts, to whose opinions upon questions of common and commercial law, we may safely appeal when our own tribunals are at variance.

It will be remembered that in the olden time the partnership property under an execution for the private debt of one of the partners was levied upon precisely as if the partners had been tenants in common, nor was any account taken of the partnership debts, or of the liens or equities of the other partners, but the purchaser acquired an absolute title at law to the share of the partner, to one-half if there were but two, to one-third, if there were three, and so on, subject, however, to an account in equity; exclusive possession in the meantime, being given to the purchaser as was the law in regard to tenancy in common. Struck as he could but be by the injustice of such a course, Lord Mansfield changed the practice by requiring an account to be taken at law, so that the indebted partner's interest could be ascertained at once, and no more than that interest sold. This practice was, however, disapproved by Lord Eldon, and subsequent Judges, because of the supposed impossibility of taking such an account at law, and that jurisdiction was again confined exclusively to Courts of Equity. But since the time of Lord Mansfield, it is believed that no English authority can be found supporting the idea that the property of the partner-

ship must be delivered to the purchaser under an execution against the individual partner for his private debt.

In Gow on Partnership, the rule is stated as follows: "The creditor of any one partner may, therefore, take in execution that partner's interest in all the tangible property of the partnership; *but the levy under the execution transfers no part of the joint property*; it merely gives a right to an account, each partner having an interest not in the whole, but in the surplus merely." In *Johnson vs. Evans*, 7 Man. & Gra., 240, Tindall, C. J., admitting that for the purpose of making the execution effectual against the share of the debt, or partner in the joint property, the sheriff must seize the whole, goes on to say: "In any way of considering the case, the seizure of the whole, which is made of necessity, leaves the property of the solvent partner, and the possession also, which follows the property in chattels, just where it was before, that is, in the solvent partner." And referring to Lindley on Partnership, the most recent and reliable English authority on the subject upon which it treats, so far as we are informed, we find, that after stating the law to be undoubtedly that the sheriff, with an execution against the individual partner for his private debt, if he desires to levy upon his interest in the partnership property, must seize it, says: "It is to be observed that the sheriff seizes, sells and assigns, but he has no business to take the goods of the firm out of the possession of the solvent partners," citing Patterson, J., in *Burnell vs. Hunt*, 5 Jur., 650; see also *Fox vs. Hanbury*, Cowp., 445; *Dutton vs. Morrison*, 17 Ves., 201; *Sitler vs. Walker*, Freeman's Ch. R., (Miss.) 77.

The officer then, in such a case, levies upon the interest of the indebted partner and seizes the whole of the partnership property. But it is evident that the seizure intended does not necessarily mean an actual taking from the possession of the partnership, or of the solvent partners. We suppose that all that is meant is, that kind of seizure which is implied in every levy upon personal property; and it is well understood law that the officer need not actually take into his possession the goods or other personal property, in order to make his levy complete and effectual. All that is required is that he shall have the property in view and openly assert his title under the execution. Much, however, will of course depend upon the character of the property levied upon as to the necessity or propriety of taking it into his actual possession; and whilst in many cases of the kind of which we are now speaking, a regard for his own safety

and for the interest of the creditor, might require of the officer an actual seizure and the dispossession of the partner not in fault, cases may be readily imagined in which, on the other hand, regard for the interests of the solvent partners might justify a different course.

And now, having considered the question whether the purchaser under the execution against a partner for his private debt of his interest in the partnership property is entitled to its exclusive possession, subject only to be called to account in a Court of Equity by the other partners, we come to the inquiry whether an action of replevin can be maintained against him for its recovery by the partnership when he has obtained such possession by its delivery to him by the officer, the negative answer to which is, it will be remembered, the second resolution in our case. And this question we will dispose of very briefly. Its answer indeed depends entirely upon the one first proposed, and already discussed, as to the right of the purchaser to demand possession of the officer; for if he is not entitled to such possession, the officer transcends his authority and goes beyond his duty in delivering the property to him, and thereby becomes a trespasser *ab initio*: *Six Carpenters Case*, 1 Smith's Ld. Cases, 259, and notes. And being such trespasser, he would never, in contemplation of law, have acquired any title by his levy, and of course could communicate none to the purchaser. Such delivery would not be one of those irregularities in the manner of executing the writ which have been held not to vitiate the title of the purchaser, but a misfeasance which would invalidate every step which had been previously taken by him under the execution, no matter how regular. Indeed, it would be impossible that such delivery could be made without the purchaser's being a participator in the wrongful act; for the sale, to be effectual, must be of the partner's interest and not of the whole property; which would necessarily bring home to the purchaser knowledge of the rights of the other partners. A sale, accompanied by such a transgression of authority, would be no more defensible either by the officer or the purchaser, than a sale of the entire property or of the entire title of any specific part of it without regard to the partner's limited interest, which, we take it, would be absolutely void even as to that interest; for besides making himself a trespasser by such sale (*Waddell vs. Cook*, 2 Hill, 47), he can levy upon and sell, for the private debt of the partner, no more than the partner could himself sell for that purpose; and it has been held in a number of cases,

that a sale made by one partner, not of his interest, but of the partnership property itself on private account, is an absolute nullity if the partnership elect so to treat it. But independently of the latter reason, the fact that by making such sale he becomes a trespasser in the act of sale, and consequently as to every previous act done by him under the writ, would of itself be sufficient to render the sale ineffectual to pass title to the purchaser, as title can not be derived through the trespass of another.

The position that the officer after having sold the partnership property under an execution against the individual partner for his private debt, can deliver possession to the purchaser, it is believed, has been decided by no other case in this country except that of *Haskins vs. Everett*, and the only direct authority for its support which we have been able to find is a *dictum* of Cowen, J., in the case of *Phillips vs. Cook*, 24 Wend., 407, where he uses this language: "With deference, I do not see that the authorities will justify his refusal to deliver possession either at law or in equity, except under the sanction of some court qualified to direct him in such a course." We suppose the deference here meant was to the opinions of his brother Judges, who, he tells us, in the beginning of his opinion, had some difficulty upon the question, which was whether trespass would lie against the sheriff for seizing and selling under a *fi. fa.*, the property of an insolvent firm to satisfy the individual debt of one of the members. The Court, however, after some difficulty, as it seems, finally agreed that the sheriff was not liable to the action for the seizure; but, as we are left to infer, did not agree that possession could be given by him to the purchaser at his sale; and probably if the question had been whether he had not by such a delivery made himself a trespasser, the result would have been different; and we have seen that in the case of *Harris vs. Murray*, in 28 N. Y. R., the opinion is expressed that the sheriff has no right in such a case to deliver to the purchaser. So that we may assume the law in that State to be, that the sheriff, selling the partner's interest under an execution against him, has no authority to deliver possession of the partnership property to the purchaser; and in this we believe that all the cases and authorities agree, unless we consider *Haskins vs. Everett* an exception.

Whether if such possession is delivered, an action of replevin will lie against the purchaser by the partnership, we believe from our researches, has never directly arisen in any other case. Actions of trespass against the officer for seizing the partnership property,

and thereby depriving the other partners of its possession, have been frequent and have been sustained, or not, according to the views which have been entertained by the courts as to the right of the officer to seize the partnership effects under an execution against one of the members; upon which subject, as we have seen, there is great conflict. In *Scrugham vs. Carter*, 12 Wend., 131, it was held that an action of replevin will not lie against the sheriff by the other partners for seizing and removing the goods of the partnership under an execution against one of the partners, upon the ground that the levy invested the officer with all the rights as to possession and control of the property which the defendant in the execution had; and that as one partner could not be deprived of the possession of the partnership goods at the suit of the other partners, the officer who had acquired his interest by the levy could not be. But as is well said, we think, by Parker, J., in *Morrison vs. Blodgett*, this does not show that an action might not well be maintained against any third person or even against the officer himself. But the question of course would be a very different one if the action be brought against the purchaser. If the officer has no right to deliver possession to him, he acquires such possession by a wrong, in which, as we have said, he must necessarily have participated if he purchase only a partner's interest, and nothing can be clearer than that he can thereby acquire no right to retain it.

It will be observed that the conflict in the American cases is principally confined to the question as to the manner in which the officer should make his levy of an execution against an individual partner, some of them holding, as we have seen, that the interest of the partner must be levied upon in the same manner as his stock in a private corporation, treating his interest in fact as if it were something intangible; while others decide that such interest may be levied upon the whole *corpus* of the partnership property, and that the officer may seize all the tangible effects of the firm. The latter course is in accordance with the English rule and is supported by the decided weight of authority. And not only *may* he do so, but, according to these authorities, he *must* do so for his own protection and to make the execution effectual. The manner of levying we suppose must be exactly as if the execution were against the partnership itself, although the very property itself is not levied upon, but only the partner's interest. Nor would a levy in any other manner be effectual. But it is evident that where this is the require-

ment, it may sometimes lead to very great difficulties in the execution of the writ. We will suppose, for instance, that the partnership property consists of vessels engaged in navigation, only one of which is found within the sheriff's bailiwick during the time within which he is required to execute the writ, or that the partnership is a mercantile one with establishments and goods in different counties or even in different States. Is the officer to levy upon the property within his bailiwick, and sell the partner's interest in that part? That, according to the weight of authority, as we have seen, he can not do. For how would the interest of the partner in one vessel or in one stock of merchandise be ascertained in the cases supposed? And if we suppose the other portions of the partnership property to be levied on at the same time in other jurisdictions, how could the conflicting rights of the execution creditors and purchasers be settled?

However such embarrassing questions may be decided when they arise, we must conclude to adopt as the general rule of the law of partnerships that the officer is required to levy his execution upon the interest of the individual partner in the partnership effects by "seizing" such effects if they be tangible, and that those States which have adopted and follow a different course, as New Hampshire, for instance, have a law upon the subject peculiar to themselves. Having made the seizure, it will of course be the duty of the officer to continue in possession, either by himself or his bailiff, until sale; not, as we think, however, necessarily depriving the other partners of all control or management; for there might be many cases in which neither the safety of the officer nor the interests of the execution creditor would require such exclusion; as in cases of large manufacturing and commercial partnerships, the solvency and honesty of which were undoubted. In such cases the firm might well be permitted to "go on, dealing as before, buying and selling and delivering goods:" Parsons on Part., 357. This, however, would be a matter for the discretion and judgment of the officer and his *right*, under this general rule, to take the exclusive possession could not perhaps be questioned. But after the sale he must abandon or give over the possession of the property to those from whom it was taken. Having secured his own safety and the rights of the creditor by his possession up to that point, he must leave the purchaser afterwards to look out for its own safety, and the latter having bought an uncertain and unascertained interest must take all

the risk for the future, and must take whatever steps may be necessary to ascertain that interest and make it available. He has no right to the possession of the property, and if he should obtain it either by delivery to him by the officer or in any other manner, the action of replevin could be successfully maintained against him for it by the former partnership or its members. This, we think, is the fair conclusion from all the cases, except that of *Haskins & Reynolds vs. Everett*.

R. HUTCHINSON.

Memphis, Tennessee.

## THE PRIVILEGE TAX.

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No man shall be deprived of his property but by the judgment of his peers or the law of the land: Constitution of Tennessee, Art. 1, Sec. 8.

Excessive fines shall not be imposed: *Ib.*, sec. 16.

The courts shall be open and right and justice shall be administered without sale, or denial, &c.: *Ib.*, sec. 17.

Passing to art. 2, sec. 28, we find the usual Constitutional provision that, "taxation shall be equal and uniform." "But," it is added, "the Legislature shall have power to tax merchants, peddlers and *privileges* in such manner as they may from time to time direct."

No hereditary privileges are to be *granted*, and monopolies are forbidden.

The former provisions are under the head of the Declaration of Rights.

It is natural to infer that there is in reason and there ought to be in law a known and permanently defined line of distinction somewhere, between a right and a privilege.

We do know that there is often a marked difference in what the law in a given case is, and what it ought to be.

It is equally clear that men have certain natural rights that no Constitution, nor no legislative enactment ought to interfere with. Whatever these rights may be generally conceded to be, it is unwise legislation that either touches or threatens them.

In discussing this subject, we concede that the taxing power of a Legislature, in the absence of any constitutional provision, is practically without limit, so long, on the hand of equity, as equality is observed, and so long, on the hand of law, as it has the force at command to collect its levies.

The foregoing provisions of the Constitution of 1870, are in substance identical with the provisions of the Constitution of 1834.

It has been the habit of our Legislature, from time to time, to exercise the grant of power following the above disjunctive conjunction "but," by passing acts enumerating certain occupations and transactions, and by legislative enactment defining them to be

privileges. The Legislature finds a man exercising one of the rights that are guaranteed formally to every citizen by every Constitution—and *presto pass!* Be it enacted, &c., that this is a privilege, and it is such in a second. The benefit thus conferred must be paid for. The Legislature fixes the price. It is an eagle to-day. It may be a thousand eagles next year. If not promptly paid, it is doubled; a fine is imposed. Imprisonment is threatened. Goods are distrained and confiscated. This is taxation of privileges.

To-day, it is such a privilege to follow the business of a merchant or a butcher. Next year, or the next, it may be a like privilege to be a farmer, or to be the parent of a male child, as the Legislature may direct.

We quote the enacting clause in one of these acts, as a suitable illustration. "Be it enacted," &c., "that the occupations and transactions that *shall be deemed* privileges, and taxed, and not be pursued or done without license, are the following." (The italics are ours, of course, in all quotations of laws, &c.)

Then follows the long list. Let every friend of his State read it, think of it, and ask himself to what may all this lead? Various acts have been passed, as has been intimated, levying fines and penalties for non-payment, &c. We refer to a few examples: Clerk to issue distress warrant for a tax double the highest tax imposed upon any privilege, and the officer shall distrain delinquent's goods: Act 1847, ch. 161, sec. 23.

The officer to execute such warrant at once or be liable for double tax, costs, &c., lost by his delay: *Ib.*, sec. 24, Act 1849, ch. 122.

In all cases where such penalties are recovered, double clerks' fees and double attorneys' fees allowed: Code, sec. 707.

In the Revenue Laws of 1867-8, ch. 79, sec. 16, we see the following: "No injunction or petition for mandamus shall be granted by any Judge or court in this State, or any bill or petition for mandamus alleging the illegality or unconstitutionality of any of the revenue laws of this State restraining any officer or officers charged with the collection of the public taxes of this State, except upon a final hearing of any cause in the court of last resort if an appeal should be taken to that court; provided, that should any person be proceeded against by an officer charged with the collection of the public revenue, or failing to pay the revenue due the State or County or for any violations of the revenue laws of this State, such person or persons shall immediately suspend business, and shall not by himself, or themselves, or any other persons whatever, be permitted

to transact or carry on the business or occupation for the violation of the law for which he or they have been proceeded against. A violation of this act is a misdemeanor, and on conviction, the party violating the laws shall be subject to a fine of one hundred dollars and shall be imprisoned in the county jail for a period not exceeding twenty days," &c., &c.

It has been the habit of the Legislature also to tax litigation from time to time. See Act 1871, ch. 101, secs. 1 and 3, imposing a tax on the losing party. It will be interesting for the close student of law, and the science of government, to compare this act and all others like it with sec. 1, art. 1, of our Constitution. Which is right? Which is the better fitted for a theory of law, and which the better for actual practice?

What can we say is the standard price that the Legislature may put upon the judicial determination of a citizen's right?

The Constitution, as above said, provides that taxation shall be equal and uniform, but then follows the disjunctive and contrary clause, under which the Legislature may make it otherwise at any time and in any degree, at the will and caprice of that body. If this law relating to the special taxation of merchants, peddlers and privileges has any origin in precedent, it is found in the *English excise laws*, and we will undertake a brief review and a comparison to see how much our law of special taxation has gained in these years of advancing civilization. The English Excise originated in the war between Charles I. and the Parliament. According to Blackstone, John Pym was the evident father of it.

But in the origin of it, it was a tax laid upon commodities in the hands of the consumers, the venders, or else the manufacturers. In the first place, the tax was levied upon beer, ale, cider and perry; and when the people had become somewhat accustomed to this, the list of articles was gradually extended, until it was pronounced to all practical purposes a general tax. Pym writes to Hotham as Justice Blackstone states, "that they had proceeded in the excise to many particulars, and intend to go on further; but that it would be necessary to use the people to it little by little."

It was in effect a change in the form of the customs and an extension of them, although it was a separate tax.

When this species of taxation had become general, and had been to some extent established by custom, spirits were excised at the distillery; printed silks and linens at the makers; while such articles as silver plate were excised in the hands of the vender or

merchant, and to save the trouble of taxing the various articles he might sell, he paid a specific sum per annum for which he obtained a license to sell this class of taxable commodities; but this was considered a payment of the tax on the property. Such was the odious excise in England in those revolutionary times, but in Tennessee the merchant not only has to pay a property tax like other citizens, if he has property, but he must pay a tax on the goods he sells, represented by the capital with which he buys them; and, still further, he must pay a tax for the privilege—a bonus demanded of him and collected of him for no compensation, practical or theoretical; a something taken by the State for nothing. Besides this, he must give bonds and must make strange oaths, all of which things may be fully seen on reference to our revenue laws, but are unpleasantly familiar to a minority class in Tennessee.

The moment when this species of special taxation is sufficiently extended to touch generally the classes of citizens in the majority, like a great pain, it will find quick relief, and will vanish like an unsubstantial shadow.

In England the excise was laid upon lands sold at auction, the auctioneer paying a pound rate, and also an annual duty in addition.

In Tennessee the land is taxed in the first instance. Second, the agent who sells is taxed a per cent. on the sale, and a specific sum on his occupation or privilege. Third, the auctioneer is taxed. Fourth, there is a tax on the transaction itself of a certain per cent. of the price of the land.

In regard to the memorable levy of ship money in England, the tax on one of the wealthy commoners was only a few shillings. Hampden resisted this in the courts, but the overruling tendency of courts to sustain revenue measures led to his defeat and for this reason, convinced that property was not safe in England, he and Cromwell, as it will be remembered, started for America.

Under the Tennessee privilege tax not a few shillings is imposed upon a wealthy man, but ten, twenty-five, fifty, one hundred, two hundred dollars, are taken by force from a man who has only his hands and his industry. If he has any goods, they are distrained. If he is unable to "deliver" promptly at the cry "stand"—penalties are imposed—he must stop business; he is deprived of property, deprived of the privilege of toil, deprived in fact of liberty.

It is interesting to note what Mr. Blackstone says, after giving the list of articles to which the excise was applied, which of itself will

not occupy much more than a square, printers' measure, he adds these words, "a list which no friend to his country would wish to see further increased."

What would he have said to our list of occupations and transactions that are so heavily taxed without the remotest reference to any idea of property?

What is a privilege?

Light is a thing which God said let it be, and it was.

A privilege is anything which, let our Legislature say, let it be a privilege, and a privilege is that thing, and that thing is a privilege. This peculiar clause in our Constitution and the action of the Legislature has led to the discussion of the above question, and the above definition of a privilege will abide the test of law in this State as we shall see. Anything seems to be a privilege on which a tax is laid if it does not come under the head of property, merchant, or peddler. However absurd the statement may seem, it is true that as the law is in this State, there is scarcely a trade, profession, occupation, art, craft or device; not a faculty of the mind or member of the body capable of exercise and of work; and not any way or means whereby a man may possibly earn his bread, that may not be taxed in any degree, at the will of the Legislature for the time being, and what is not taxed is by the grace of that body and not by the right of the citizen.

If this be true, it will be seen that it is time that some change be asked by the people, before the time shall come when all shall be made to feel the hand of power that may be brought down upon one or more at any moment. It is time, too, that the few who have felt and are now feeling its pressure, should ask relief from the Legislature itself, the only power able to afford a remedy until either the Constitution is altered, or the whole people, driven by the exercise of this power to revolution.

If the above statement as to what our law is was made in ordinary newspaper correspondence, it might, with some justice, be called sensational writing. We are not writing for this purpose, but to point out what we believe to be a great evil, and to ask a remedy. Having made the above statement in the serious belief that it is practically true, we now come to the proof of its truth by the testimony of reason and the evidence of experience.

We have made sufficient quotations from our revenue laws to give some notion of them to such as are not familiar with them. It has been held by some that wherein these statutes assume to lay a tax

upon an occupation not had or benefitted by any charter from the State, and which has received no benefits specially from any legislation, it being such an occupation as is not opposed to public policy, takes no special benefit from public highways or franchises, but is such as all citizens are supposed to have a natural right to carry on in the pursuit of happiness, or, in more practical terms, in the earning of an honest living—they are unconstitutional, as such an occupation is a right existing independent of the Legislature, and not a privilege in which the latter has any proprietary and taxable interest. We will review some of the reasons advanced in support of this position. So far as the Constitution of itself is concerned, the clauses quoted in this article are sufficient for our purpose, and they must be remembered. When some special word is used in a contract or in a statute, or in a constitution, its usual and legal definition must hold, unless the context show that some other signification is intended. (*State vs. Smith*, 5 Humph., 394). Suppose the occupation sought to be taxed is that of a farmer. The Legislature finds A. in possession of a farm on which the property tax is paid. He has horses, plows, seeds and all things necessary to carry on farming operations. His right to plow his ground and sow his seed has been recognized, and he has been in the undisturbed enjoyment of it. To do this work is a right in him as inviolate and indefeasible as anything known in law as a “vested right.”

Such a right writers on constitutional law have said the Legislature has no power to deprive a man of. See Sedgwick on Constitutional Law, 511. (Such a power as this, however, our Legislature has exercised, and is exercising every year.) It is said that a Legislature can not select any specific property as the subject of taxation and assess the owner distinctly from his equal share of tax as required of all persons. If the law of taxation stands on any foundation other than force, and the iron pedestal of power, it is on the principle of equity and uniformity. If it is law that one man's property shall be taxed just as every other man's property is taxed, the whole being in consideration of necessity, protection, etc., then it ought to be law, that when two men have each an occupation or a trade, neither of which has received any special favor from the Legislature, neither of which has involved in its creation or use any public expenditure, if one of the occupations is taxed as such, the other should be equally taxed.

While we hold that all taxation should be directly or indirectly on the basis of property, and property only, unless it be a poll-tax,

we believe that in accordance with the principles that are best spoken of in the best law books, that if one man's trade or occupation is taxed at all, every other man's should be equally taxed, unless some reason deserving the name, can be shown for a difference in the assessment, while, if A. is not taxed at all, and B. is taxed to the extent of one cent., the inequality is greater, and the injustice is more flagrant, than if A's. property is taxed to the taking away of one-tenth, and B.'s to the taking away of all and leaving him still a delinquent.

In Burrell's Law Dictionary a privilege is defined to be, that around which the law throws some peculiar favor or protection.

Corporate powers may be granted that may amount to a privilege.

If a valuable monopoly is granted, it amounts to a privilege.

Such a privilege when taxed, presents a case of something paid for something received. The State, in such an instance, does not take something for nothing.

The most notable instance of a privilege tax, is that paid to the English Government by the Bank of England. But what has the English Government done for the Bank of England? what special favor or protection has she clothed this corporation with that she should levy a special tax against it?

In a parallel case in Tennessee, the true answer would be nothing in the world but to tax it and collect the tax. She has granted it no special favor but to lay upon it a special tax. But in England and with the Bank of England, the answer is quite different.

The bank was exempted from the usual stamp duty on its notes. It had the exclusive privilege of banking in London. No newly chartered banks in all England were allowed to issue any bill of exchange or note payable on demand. This bank therefore had an entire monopoly of business guaranteed to it in several respects. Its notes were made a legal tender for debts due from anybody, except the bank itself.

Hindrances were thrown in the way of the issuance of notes of any kind by other banks, so that, to all intents and purposes, this Bank had a monopoly of the business in England. This was a privilege in the sense that seems natural and reasonable. It was that around which the law placed a particular favor or protection. Should the Government grant similar privileges to another corporation, it will be seen at once, there would be a breach of faith and of contract.

In Tennessee the victim of the privilege tax gets no special

powers, no monopoly, no guaranty of any kind. The implied language of the law is to the citizen, you shall not work unless you pay so much. If the law would say to A, you shall have a monopoly of the corn culture, and to B, you shall have a monopoly of wheat growing; you shall pay so much and no one else shall enter into competition with you, there would be a something which the tax could be said to pay for. But the law selects A., and D., and W. from the mass of citizens and says to each you shall not do this, you shall not grow corn, and you shall not follow your trade unless you first pay so much. Give me your money or I will take your life. Give me one hundred dollars cheerfully or I will take away from you two hundred dollars by force.

It is a maxim of law that a common burden shall be sustained by a common contribution.

Chancellor Kent says: "It is not sufficient that no tax can be imposed on the citizens but by their representatives in the Legislature. The citizens are entitled to require that the Legislature itself shall cause all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals, and no one species of property may be unequally or unduly assessed." (2 Kent's Com., 331).

That law which prescribes a rule for one man or class of men contrary to the general law, is not worthy to be called legislation.

The modes of the assessment and collection of these special taxes are entirely contrary to the general laws for the assessment and collection of taxes. These laws are enforced against a few. They could not be enforced against the many, unless they be brought gradually to it, and the work of doing this is going on year by year. Look at the growth of the list of privileges, from year to year, since the war, and see whether this be so or not. Such legislation is nothing less than despotism. Under such a system of revenue laws no man may know what his rights are. He can not guess what share of the public burden may be put upon him. He has no means of calculating what is to be required of him. There is no rule that he can say is stable. There is no criterion established that may certainly endure. Taxation may not visit his door this year. Next year it may make him a bankrupt. It is not ship money, nor chimney money that he may foresee and provide for, knowing whether or not he shall be liable for a share of it, but it is the privilege tax, coming as a thief in the night—he knows not when nor how until it is upon him.

The possession of a home or a hearth, or the non-possession thereof, decides nothing. Property decides nothing. The Legislature of this year decides nothing for the next year. This body may send this skeleton thief to him at any moment, demanding any amount of money. Per cents. and *ad valorem* rates are held for nothing.

No man is safe unless he be a vagrant. Any occupation of industry may be taxed beyond the limit of its earnings, while the vagrant may be supported at public expense. It is absolutely painful to read the various provisions of our statutes for the levying and collecting of fines and penalties, for distraints, sales of goods, double taxes, double fees, preventions to the seeking of redress in Courts, etc. The old-fashioned sense of the term "law of the land," as used in our Constitution, is wholly abrogated, or else held to apply to everything except the privilege tax. The act of Assembly is the law of the land, all and in all, and above all. It is legislative, executive, judicial, ministerial, and all else. It not only takes judgment without a verdict, and proceeds to execution, but it prescribes what verdicts and decisions shall be in advance, adjudicating even the costs and attorney's fees. It may hear, but not till after it has determined. If you can prove that you are robbed, you may sue the robber at your own risk, but you must first give him your money. (See Revenue Laws of Tennessee.)

The Supreme Court of one of our States (New Hampshire) once announced this doctrine; all statutes not repugnant to others clauses of the Constitution, seem always to have been considered as the "law of the land" within the meaning of this clause. (Clause similar to one above quoted) but even this judgment was reversed by the Supreme Court of the United States. As a most striking contrast to what the law of the land is in our State, we quote the beautiful language of Webster, used in defining this term:

"A law which hears before it condemns—which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. Every thing which may pass under the form of an enactment is not, therefore, to be considered as the law of the land. If this were the case, acts of attainder, bills of pains and penalties, acts of confiscation, acts of removing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land.

“Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. The administration of justice would be an empty form and idle ceremony, and Judges would sit to execute legislative judgments and decrees, not to declare the law and administer the justice of the country.”

We read the above, and then we look at the statutes of Tennessee, especially in regard to the levying and collecting of privilege taxes, and merchants taxes. We review the provisions for fines, penalties and distrains; we look about us and see these provisions enforced against citizens; we see the courts sustaining the proceedings, deploring the wrong, but unable to give relief: We are impelled to say that the language of prophecy never more faithfully portrayed a coming event than the above language of Webster pictures the actual state of legislative government as it exists to-day in our own State. The most important provisions of our constitution are binding on all except the Legislature, and in regard to taxation it is only prohibited from spoliation and legalized robbery of the citizen to the limit of its own choice and necessity, it being the sole judge in both cases. Thou shalt not steal nor rob unless thou chooseth to do it. We will pursue this subject further in another paper.

J. S. WILTSE.

Chattanooga, Tenn.

## *Exchange and Re-Exchange; and Damages upon Dishonored Negotiable Paper.*

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§ 1. In the United States the whole subject of re-exchange and damages has been very much simplified by the enactment of statutes establishing fixed amounts of damages in lieu of re-exchange; and even previous to statutory provisions on the subject, mercantile custom had in some of the States prescribed fixed rates of damages equally as effectually. Immemorial usage, at an early day, allowed ten per cent. as damages in lieu of re-exchange on bills drawn in Massachusetts on England, and returned protested,<sup>1</sup> and twenty per cent. on the like bills drawn in New York.<sup>2</sup> In England it seems that a similar rule was adopted in the commerce between England and the East Indies to allow a certain per cent. in particular cases in lieu of re-exchange, but it was merely conventional as between parties agreeing to it.<sup>3</sup>

In 1700 a statute was passed in the Colony of Pennsylvania allowing twenty per cent. on bills drawn upon England, or any part of Europe;<sup>4</sup> and in 1743 Rhode Island adopted one of similar purport.<sup>5</sup>

Now every State has recognized the convenience and utility of regulating the matter by statute, and their Codes contain ample provisions on the subject. But they lack uniformity, and consequently in transactions between the States there is great diversity in the rights and liabilities of parties. It has been thought that Congress has a right to prescribe fixed rates of damage, under the clause of the constitution authorizing it to regulate commerce between the States.<sup>6</sup> But no action has been taken by that body.

§ 2. These statutory damages are not given as a penalty for drawing without authority, but as commutation for interest, damages, and re-exchange.<sup>7</sup> "It is in truth," says Gibson, C. J., "a liquidation of the damages, not by the parties, but by the law fixing

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<sup>1</sup> *Grimshaw vs. Bender*, 6 Mass., 157.

<sup>2</sup> *Hendricks vs. Franklin*, 4 Johns., 119.

<sup>3</sup> *Auriol vs. Thomas*, 2 Term. R., 52.

<sup>4</sup> *Francis vs. Rucker*, Ambler, 672.

<sup>5</sup> *Brown vs. Van Braum*, 3 Dallas, 344.

<sup>6</sup> Mr. Verplanck's report to House of Representatives, March 22, 1826; *Edwards on Bills*, 750; *Sedgwick on Damages*, 274; 1 *Parsons, N. & B.*, 654.

<sup>7</sup> *Bangor Bank vs. Hoak*, 5 Greenleaf, 174; *Allen vs. Union Bank*, 5 Whart., 420; *Lenning vs. Ralston*, 23 Penn. St., 137.

the compensation for the loss beforehand to save time and litigation; and if damages need not be specially laid where there is no statute on the subject, as they certainly need not be in England, no rule of pleading requires them to be laid in their liquidated form.”<sup>1</sup> The damages given by statute constitute as much a part of the contract as the interest.<sup>2</sup> But while they are now universally fixed in amount by statute, the whole theory from which they are derived springs from the right of the holder to indemnity for dishonor of the bill, which was formerly worked out through the doctrine of re-exchange. And it is still necessary to a thorough understanding of the subject of damages that the rules of the law merchant respecting exchange and re-exchange should be held in view.

§ 3. The very name of the instrument, “bill of exchange,” indicates the office which it so frequently performs, that of exchanging a debt in one place or country for a debt in another place or country. When a person in one place or country owes money to a party in another place or country, he does not in general discharge the debt by transmitting the money, which would involve risk and expense, but purchases from some banker or other person who has money due him at the place where he has the amount to pay a bill drawn for that amount upon the banker or such other person’s debtor. This bill is drawn payable to the purchaser’s creditor, or to himself, and indorsed by him to his creditor, as he sees fit, and when presented to and paid by the drawee it extinguishes the original debt. The facility with which such a bill may be procured depends upon the commercial relations between the two places or countries betwixt which it is required.

Thus: If there are more debts due from New York to London than from London to New York, the demand in New York for bills on London will be greater than the demand in London for bills on New York; and, consequently, while in London, where there are many creditors of debtors in New York, it will be easier and cheaper to procure a bill of exchange on New York than it will be in New York, where there are a less number of creditors of London debtors, to procure a bill on London.

It would follow from this state of affairs that in London bills on New York would be at a discount, creditors preferring to take lesser amounts of cash in hand than to undergo the trouble and delay of collecting their debts in New York. This discount, which is in effect a sum paid by the London drawer of an order of payment on

<sup>1</sup> Lloyd vs. McGarr, 3 Barr, 474.

<sup>2</sup> Bank U. S. vs. U. S., 2 Howard, 711.

his New York debtor, is called *exchange*, and the course of exchange is said to be against New York. It is also in favor of London, for in New York, a draft on London being in greater demand, would bear a premium; that is, a purchaser would pay for it more than the amount of its face. This premium is also called *exchange*.<sup>1</sup>

It follows that the rate of exchange between two countries is that amount of premium which it will cost to replace a sum of money in the one country in the other; or which a right to a sum of money in one country will produce in another country. In other words, it is the difference in the value of the same amount of money in different countries.

### *Natural and Artificial Exchange.*

§ 4. The rate of exchange between two countries is sometimes natural and sometimes artificial. "Thus," observes Parsons, "an exchange is never nominally at par, because our statute makes the pound sterling equal to only four dollars and forty-four cents, which is really ten per cent. less than it is really when paid in gold. Accordingly, while £100 is legally worth only \$444, to pay that sum in London one must pay in New York, if the exchange is actually at par, about \$484. A recent United States statute has provided that, for the purpose of estimating duties on imported goods, the pound sterling shall be calculated at \$4.84, which is about its true value. (Statute July 27, 1842, ch. 66, 5 U. S. Statutes at Large, 496.) But the matter of exchange is left to itself. Merchants regulate that by adding from nine to ten per cent. to the actual rate of the day (or that which would be the rate if it were determined by business alone), and thus the buying and selling rate is made. This is seldom less than eight per cent., for if it falls so low, or nearly so low, gold comes over from England, and seldom more than eleven, for if it rises so high, or near this rate, gold instead of bills is sent to England."<sup>2</sup>

### *Par of Exchange.*

§ 5. By the par of exchange is meant the precise equality of any given sum of money in the coin or currency of one country, and the like sum in the coin or currency of another country into which it is to be exchanged, regard being had to the fineness and weight of the coins as fixed by the mint standard of the respective

<sup>1</sup> See Thomson on Bills, 439.

<sup>2</sup> 1 Parsons N. & B., 663.

countries.<sup>1</sup> Marius says: "*Pair*," as the French call it, "is to equalize, match, or make even, the money of exchange from one place with that of another place; when I take up so much money for exchange in one place to pay the just value thereof in other kind of money in another place, without having respect to the current of exchange for the same, but only to what the moneys are worth."<sup>2</sup> It is necessary to this purpose to ascertain the intrinsic values of the different coins; and then it is a mere matter of arithmetical computation to arrive at the amount of the one which will be the exact equivalent of a certain amount of the other, in to which it is to be exchanged. When this has been accomplished, and the exact equivalent of a certain amount in one currency has been ascertained in another, should it be desired to transmit such amount from one country to another, the rate of exchange between the countries will be added to or subtracted from such amount, accordingly as the course of exchange is in favor of the one country or the other. So the par of exchange is the equivalency of amounts in different currencies, while the rate of exchange is the difference between these amounts at different places.

§ 6. Gilbert remarks on this subject, in his Treatise on Banking: "The real par of exchange between two countries is that by which an ounce of gold in one country can be replaced by an ounce of gold of equal fineness in the other country. In England gold is the legal tender, and its price is fixed at £3. 17s. 10½*d.* per ounce. In France, silver is the currency, and gold, like other commodities, fluctuates in price according to supply and demand. Usually, it bears a premium or *agio*. In the above quotation, this premium is stated to be 7 per *mille*; that is, it would require 1.007 francs in silver to purchase 1.000 francs in gold. At this price the natural exchange, or that at which an ounce of gold in England would purchase an ounce of gold in France, is 25.32½. But the commercial exchange—that is, the price at which bills on London would sell on the Paris Exchange—is 25 francs, 25 cents, showing that gold is 0.30 per cent. dearer in Paris than in London. Tables have been constructed to show the results of each fluctuation in the premium of gold in Paris and Amsterdam."<sup>3</sup> And in Cunningham on Bills, it is said: "By the par of exchange is meant the precise equality between any sum or quantity of English money, and the money of a foreign country into which it is to be exchanged, regard being had

<sup>1</sup> Cunningham on Bills, 417; Story on Bills, § 30.

<sup>2</sup> Marius on Bills, 4.

<sup>3</sup> Gilbert on Banking, 424-5.

to the fineness as well as to the weight of each. When Sir Isaac Newton had the inspection of the English mint, he made, by order of Council, assays of a great number of foreign coins to know their intrinsic values, and to calculate thereby the par of exchange between England and other countries; of which a table is given by Dr. Arbuthnot. And he says you may thereby judge the balance of trade, as well as the distemper of a patient by the pulse. And this, it seems, induced Mons. Dutot, in a late book, entitled *Reflexions Politique sur les Finances*, to follow the same path in calculating the par of exchange, and to say that the balance of trade may be thereby as well judged of as the weather by a barometer.”<sup>1</sup>

### *Re-exchange.*

§ 7. From the use which Bills of Exchange subserve in transmitting money, arises the liability upon the part of the drawer for the payment of what is termed “*Re-exchange*,” in the event of the dishonor of the bill in the place or country upon which it is drawn. Thus, suppose A. in San Francisco, California, desires 2 thousand dollars in New York City, New York. He purchases a bill of exchange from a San Francisco banker drawn by him on a house in New York, and pays therefor a premium of (say) three or five per cent. In other words, he purchases New York exchange in San Francisco, and is entitled to demand in New York of the drawee the thousand dollars for which he has paid the premium. Now should it happen that the bill were dishonored in New York, it is obvious that if the holder could only recover of the drawer in California the thousand dollars which he should have received in New York, he would lose the premium which he paid for the exchange, and suffer without remedy the loss and inconvenience of returning the bill to California for recourse against the drawer.

And even if no premium had been paid, the holder entitled under the drawer’s contract to receive the thousand dollars in New York, would not be indemnified if he could only sue for and obtain that amount in California. From these circumstances grew the customary right of the holder of the bill by the law merchant to draw a bill upon the drawer,—literally a bill of re-exchange—for the principal amount which he should have received, increased by the costs of protests, and the sum which it will cost to replace that principal amount at the place where it should have been paid. Thus, if the exchange between New York and California were ten per cent.,

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<sup>1</sup> Gilbert on Banking, p. 417.

the holder of a bill for a thousand dollars drawn in California on New York, would upon its protest in New York be entitled to re-draw upon the California drawer for eleven hundred dollars, with his necessary expenses, and interest added.<sup>1</sup>

§ 8. Re-exchange, then, may be defined to be the amount for which a bill may be purchased in the country where the original bill is payable, drawn upon the drawer in the country where he resides, which will give the holder a sum exactly equal to the amount of the original bill at the time when it ought to be paid, or, when he is able to draw the re-exchange bill, together with expenses and interest; for that is precisely the sum which the holder is entitled to receive, and which will indemnify him for its non-payment.

The cross-bill is called in French the *retraite*. The amount for which it is drawn is called in law Latin, *ricambium*, in Italian, *recambio*, and in French and English, re-exchange. In point of fact the re-exchange bill is seldom if ever drawn in England, or in the United States, but the right of the holder to draw it is recognized by the law merchant of all nations, and it is by reference to this supposed re-draft upon the drawer that the re-exchange is computed.<sup>2</sup>

The United States Supreme Court remarks on this subject: "The doctrine of re-exchange is founded upon equitable principles. A bill is drawn in this country, payable at Paris, in France. The payee gives a premium for it, under the expectation of receiving the amount at the time and place where the bill is made payable. It is protested for non-payment. Now the payee and holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying to him, at Paris, the principal, with costs and charges; or by paying to him in this country those sums, together with the difference in value between the whole sum at Paris, and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris, and payable in this country, which should sell at Paris for the sum claimed."<sup>3</sup>

§ 9. The drawer may, if he pleases, limit the amount of re-exchange and expenses, in the event of the bill being dishonored, by subscribing: "*In case of non-acceptance or non-payment, re-exchange and expenses not to exceed \$——,*" or some such words. And then

<sup>1</sup>See *D'Tastel vs. Barring* 11 East, 265.

<sup>2</sup>*Byles on Bills* (Sharswood's ed.), 588.

<sup>3</sup>*Bank of the United States vs. United States*, 2 Howard, 737.

the holder can not recover a larger amount.<sup>1</sup> It might be better to say, "*re-exchange and expenses shall be so much*," for then the amount is definitely determined.<sup>2</sup>

*Indorser's Liability for Re-exchange—Accumulations of Re-exchange against Drawer and Indorser.*

§ 10. Every indorser of a bill is a new drawer, and the holder may therefore re-draw upon any indorser (as well as upon the drawer), for the re-exchange between the country upon which the bill is drawn, and that where the indorsement was made. And as soon as the indorser pays the re-exchange, he may thereupon re-draw upon any antecedent indorser, or upon the drawer, for the whole amount, including the re-exchange, between the place of dishonor and of indorsement, which he has been required to pay; and in addition the re-exchange between the place of such payment, and the place upon which the re-draft is drawn.<sup>3</sup> This principle rests upon the obvious equity and justice of indemnifying each several and successive party for the loss which he suffers by the breach of contract of his antecedents; and although when the bill has passed through numerous hands, the drawer may be burdened with successive re-exchanges between different places, it is only the consequence of his own engagement, and what is necessary to reimburse and save harmless those who trusted to its performance.<sup>4</sup>

Story says, upon the authority of Jousse, that if there be a direct commercial intercourse between the country where the acceptance and payment are to be made, and the country where the drawer lives, the rate of that re-exchange is the proper amount to be allowed to the holder, and intimates that it is only when such intercourse is disturbed that the drawer is bound for the re-exchange

<sup>1</sup>Chitty on Bills (13 American ed.), 166, 190.

<sup>2</sup>1 Parson's N. & B., 653.

<sup>3</sup>Chitty on Bills (13 Am. ed.), 686; Edwards on Bills, 732; 1 Parson's N. & B., 652; Wharton's Conf. of Laws, § 458; Westlake on Int. Law, § 234.

<sup>4</sup>D'Tastel vs. Baring, 11 East, 265; Crawford vs. Branch Bank, 6 Ala. N. S., 15; Mellish vs. Simeon, 2 H. Bl., 379. (1794). In this case the bill was drawn in England by Simeon on Boyd & Co., in Paris. It was negotiated through Amsterdam in Holland, and refused payment; and was sent back to the indorser at Amsterdam, and by him to the English drawer, with the accumulation of £300 damages. Lord Chief Justice Eyre saying: "I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the non-payment, and the loss on the re-exchange seems to me to be part of the damages arising from the contract not being performed. I thought, indeed, at the trial, that it might be a question whether the drawer was liable for the re-exchange occasioned by the circuitous mode of returning the bill through Amsterdam, but the jury decided." Buller and Heath, JJ., concurred.

accumulating by the circuitous mode of transmitting and negotiating the bill in the various countries through which it must pass.<sup>1</sup> But none of the English cases cited recognize this distinction, nor does it appear to be a principle of the law merchant resting either upon reason or authority. As the indorsers are drawers there is no reason why the holder should not draw upon the one as well as another; and that the party who has put his bill in circulation should not indemnify those who received it. Even the fact that the drawee is prohibited by the laws of his country from accepting or paying the bill, does not release the drawer's liability, for he "who undertakes for the act of another, undertakes that it shall be done at all events."<sup>2</sup> But no indorsee can avail himself of but one satisfaction of re-exchange, nor will any drawer or indorser be liable for re-exchange except when it is allowed by the laws of the country where the bill is drawn, or the indorsement made.<sup>3</sup>

*Whether or not Acceptor Liable for Re-exchange.*

§ 11. Many of the commentators on Bills of Exchange state emphatically that the liability for re-exchange is peculiar to the drawer and indorser of a bill, and does not extend to the acceptor.<sup>4</sup> Others consider the acceptor equally liable.<sup>5</sup> And others still take an intermediate view that he is liable only when he has agreed with

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<sup>1</sup>Story on Bills, § 402, quoting Jousse, Comm. sur L'Ord, 1673, tit. 6, art. 4, pp. 139, 140. In Scotland, Story's view has been taken by Forbes and Glen. (See Forbes, 151; Glen, 274.) But Thomson expresses its fallacy with his usual clearness and discrimination. See Thomson on Bills, p. 445, where it is said: "It has been said, that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places. But such a permission is implied by the drawer issuing a negotiable document, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder, being entitled, in case of its dishonor, to re-draw on any previous indorser, in order to make good his recourse against such indorser, who again has a right to do the same with any prior indorser; the drawer, as he is liable for all the consequences of dishonor, must be liable for the accumulated re-exchange arising on the successive re-drafts, because that results from the negotiability of the document which he has issued."

<sup>2</sup>Mellish v. Simeon, 2 H. Bl., 376, Heath J.

<sup>3</sup>Story on Bills, § —.

<sup>4</sup>Chitty on Bills (13 Am. ed.), 686; Chitty, junior, on Bills, 41; Byles on Bills (Sharswood's ed.), 588, 402; 3 Kent Com. Lect., 44; Edwards on Bills, 733.

<sup>5</sup>Thomson on Bills (Wilson's ed.), 446; 1 Parsons N. & B., 650; Bayley says, p. 206, chap. x, n. 41, "It seems reasonable that he should be liable to all parties where he has effects, and to all excepting the drawer, when he has not." In Kyd on Bills, 141, it is said: "The acceptor must pay re-exchange and all charges." Pothier, 117; 1 Bell Com. B., 3, chap. 2, § 4, p. 407 (5th ed.).

the drawer or indorser, for a valuable consideration, to pay the bill, and has failed to do so; and the drawer or indorser has consequently been compelled to pay re-exchange. Then they say he is bound to reimburse them.<sup>1</sup> In England, where an English mercantile firm had directed an American merchant of Pennsylvania to purchase corn for them, and draw on them for reimbursement,—and the bills drawn in pursuance of this direction were not paid,—some of them not even accepted,—the Pennsylvania merchant was permitted to prove against the English firm, not only the principal amount but also for twenty per cent, allowed by the laws of Pennsylvania against “the drawer and all others concerned,” when bills upon England were returned protested.<sup>2</sup>

This case would seem clearly to maintain the acceptor’s liability for re-exchange to the drawer. But it was afterwards held in England, that the holder could not recover re-exchange from the acceptor who, it was said, by his acceptance only charges himself with the liability to pay according to the law of this country, and if he do not pay, the holder has his remedy over against the drawer.<sup>3</sup> And Lord Ellenborough said in one of the cases where it was sought to charge the acceptor for re-exchange because the holder had suffered to that extent by the dishonor: “You may as well state that by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage.”<sup>4</sup>

§ 12. In the United States Supreme Court, the drawee who had instructed the drawer to purchase salt for him, and to draw for reimbursement, was held liable for re-exchange upon ground broad enough to include every case in which there is an authority to draw, or an acceptance.<sup>5</sup> But in this country the decisions generally deny

<sup>1</sup> Story on Bills, § 398; Sedgwick on Damages [242], 271.

<sup>2</sup> Francis vs. Rucker, Ambler, 672 (1768), Lord Campbell, saying: “The 20 per cent. is a liquidated thing, and therefore differs from the case of re-exchange. The reason of not admitting proofs of the difference upon re-exchange, is because it is uncertain damage which can not be proved. . . . The nature of the engagement is to pay the Bills or the 20 per cent., the consequential damages according to the law of Pennsylvania, the same as if it had been by express stipulation.”

<sup>3</sup> Napier vs. Schneider, 12 East, 420 (1810).

<sup>4</sup> Woolsey vs. Crawford, 2 Camp., 445 (1810); Dawson vs. Morgan, 9 Barn. & Cres., 618 (1829), Lord Tenterden, C.-J., saying: “The custom does not give a right to an indorser (against the acceptor) to recover re-exchange.”

<sup>5</sup> Riggs vs. Lindsay, 7 Cranch, 500, Livingston, J., saying: “As Lindsay was expressly authorized to draw, he certainly had a right to do so; and whether the defendants accepted his bill or not, so as to render themselves liable to the holders of them, there can be no doubt, that, as between Lindsay and them, it was their

the acceptor's liability.<sup>1</sup> Our view is this: If the drawee authorizes the bill to be drawn (which is a virtual acceptance as to the drawer who draws the bill, or the holder who takes it, on the faith of the authority), or if there is an acceptance when the bill is presented for acceptance, the acceptor is bound for all damages including re-exchange, which may result to the drawer immediately from the dishonor of the bill. If the holder sues the drawer and recovers re-exchange, the acceptor should reimburse him, as his own default occasioned the liability. If the holder sues drawer and acceptor together, the acceptor would likewise be liable, because the drawer, on paying the amount, would immediately have a claim over against him. And even if the acceptor was sued alone, he should be held bound for the re-exchange. We can see no philosophy in the cases which hold him liable only when he has specially instructed the drawer to draw for a separate valuable consideration. His liability arises out of his contract to pay the bill. A precedent debt is a valuable consideration; and if he accepts to pay the debt in a particular way, he should bear the consequential damages which his default occasions, and as Thomson has well said: "If the drawer or indorser is liable for such damage to the holder, there seems to be no reason why the acceptor, who is more immediately bound to

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duty, and that they were bound in law, to pay them. Not having done so, and Lindsay, in consequence of their neglect, having taken them up, he must be considered as paying their debt, and as this was not a voluntary act on his part, but resulted from his being their surety (as he may well be considered from the moment he drew the bills), it may well be said that in paying the amount of these bills, which ought to have been paid and was agreed to be paid by the drawees, he paid so much money for their use. Nor can any good reason be assigned for distinguishing the damages from the principal sum, for if it were the duty of the defendants to pay such principal sum, it is as much so to reimburse Lindsay for the damages, which by the law of South Carolina, he was compelled to pay, and which may therefore also be considered a part of the debt due by the defendants in consequence of the violation of their promise."

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<sup>1</sup> *Newman vs. Gozo*, 2 La. An., 642; *Hanrick vs. Farmer's Bank*, 3 Porter. Ala., 539; *Le Watt vs. Riddle*, 8 Watts, 545, the Statute of Pennsylvania was held not to include the acceptor as liable for re-exchange; *Bowen vs. Stoddard* 10 Met., 379 (1845), Hubbard, J., saying: "In cases where the drawers have been obliged to take up bills, and pay damages, because the acceptors suffered them to be protested when they had funds of the owners in their hands, and were as between themselves and the drawers bound to accept, they may recover such damages of the acceptors, because the loss is occasioned by their default and neglect. This rests, however, on the relations existing between them, and not on the ground that an acceptor as such is liable to pay damages by reason of his acceptance."

him, should not also be liable for this direct consequence of his breach of contract."<sup>1</sup>

*What Laws determine Liability of Drawer and Drawee.*

§ 13. The drawer of a bill undertakes that the drawee shall accept, and afterwards pay the bill according to its tenor, at the place and domicile of the drawee, if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow.<sup>2</sup> And so the indorser, who is a new drawer, is liable for damages according to the law of the country where he indorses.<sup>3</sup>

*Damages.*

§ 14. It results from the doctrine that the indorser is bound only according to the law of the place of indorsement, that several and successive indorsers may be bound to the holder in different amounts of damages. For the holder can only recover damages against the indorser according to the measure allowed by the law of the place of indorsement. And as the indorser can only recover damages against prior parties when allowed, and to the extent allowed, by the law of the place of their contracts, it follows, that an indorser may be required to pay more to his indorsee than he can recover against such prior parties.<sup>4</sup> Thus in Maryland, the damages on bills on Europe are fixed at 15 per cent.; in Pennsylvania at 20 per cent.; and in New York at 10 per cent. And for the sake of illustration, let us suppose that at Rio de Janeiro, Brazil, no damages whatever are allowed against the indorser of a bill or note. Now, suppose a bill be drawn by A. in Maryland, in favor of B. in New York, on C. in Liverpool, England. And then indorsed by B. to D. in Rio, and by D. to E. in Pennsylvania, and by E. in Pennsylvania

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<sup>1</sup> Thomson on Bills, 447.

<sup>2</sup> Allen *vs.* Kemble, 6 Moore P. C., 314; Gibbs *vs.* Fremont, 9 Ex-ch., 25; 20 Eng. L. & Eq., 555.

<sup>3</sup> Story on Bills, § 153.

<sup>4</sup> 2 Parsons N. & B., 342, 346; Story on Bills, § 153; 2 Kent Commentaries [2460], 596; See also, Wharton Confl. of Laws, § 458.

to F. of Liverpool, England. In such case, in the event of dishonor, F., the holder, could recover against A., the Maryland drawer, the 15 per cent. damages; against B. in New York, 10 per cent. damages; against D. in Rio, he could recover no damages; and against E. in Pennsylvania, he could recover 20 per cent. damages. But suppose now the amount with twenty per cent. damages be paid by E. in Pennsylvania, he can recover no damages against the indorser in Rio. But he may recover against the Maryland drawer and the New York indorser, the amount in full paid by him with the twenty per cent. damages added; and super-added, the exchange between Pennsylvania and Maryland or New York, as the case may be. And the Rio indorser, while not bound to the holder for any damages, may recover against the drawer and indorser the principal amount paid, with the damages allowed between Brazil and Maryland or New York, as the case may be. But by the law merchant, in the absence of any statutory enactment, each indorser is bound to indemnify his successors fully for all damages they have been compelled to pay, as we have already seen.

### *Promissory Notes.*

§ 15. Promissory Notes are not by the law merchant within the rule entitling the holder to re-exchange; or damages in lieu thereof; but they may be drawn with the express provision that they are to be paid with exchange on a certain place.<sup>1</sup> And it has been held that when indorsed they come within the reason and spirit of the rule; for the indorser of a promissory note is, in effect, and in legal contemplation, the drawer of a bill upon the maker, who is regarded as its acceptor, and there is great force in this view.<sup>2</sup> But it does not seem to be in accordance with the doctrines of the law merchant, whose peculiar rules in respect to the subject are confined strictly to bills of exchange.

§ 16. While, ordinarily, promissory notes do not carry re-exchange, it is the doctrine of the English Courts, and of some of the United States authorities, that when an amount is contracted to be paid in a certain State or country, (say for instance, the case of a note made in Virginia for one hundred pounds sterling, payable in London), the creditor ought to recover, wherever his suit may be brought, a

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<sup>1</sup> Pollard *vs.* Herries, 3 Bos. & P., 335; Grutacap *vs.* Woulluisse, 2 McLean, 584.

<sup>2</sup> Howard *vs.* Central Bank, 3 Kelly, 375 (1847). The note was made in Georgia payable in New York. Thomson on Bills, 442-3.

sum equal to the debt, due with interest; and also as much as might be necessary to replace the money in the country where it ought to have been paid.<sup>1</sup> This doctrine has been forcibly expressed by Mr. Justice Story, in a case presenting the question,<sup>2</sup> and seems to be, as he has well observed, "founded on the true principles of reciprocal justice," but it has been denied by authorities of great weight.<sup>3</sup>

§ 17. It has been held in England that where the acceptor pays a part of the bill, and it is protested as to the residue, or damages in lieu thereof, is to be reduced proportionately, and allowed only on the amount unpaid.<sup>4</sup> And this view has been taken in several cases in the United States, it being considered that damages are not given as a liquidated arbitrary mulct, but as compensation for remission of an amount of money which should bear relation to that amount.<sup>5</sup> But it would seem that the drawer contracts that the bill shall be honored, and if not, that he will pay the re-exchange, or damages, in lieu thereof, provided by statute, they being as fixed and determinate an obligation as the debt itself.<sup>6</sup> The question may turn in some cases on the construction of the particular statute.

§ 18. It is not necessary for the plaintiff to show that he has paid the re-exchange, it suffices if he be *liable* to pay it; but if the jury find that there was not at the time any course of re-exchange between the two foreign places, then no re-exchange is recoverable.<sup>7</sup>

§ 19. Besides the re-exchange the drawer and indorser of a foreign bill which is dishonored, are liable also to the holder, in

<sup>1</sup> Grant *vs.* Healey, 3 Sumner, 523; Smith *vs.* Shaw, 2 Wash. C. C., 167; Lee *vs.* Wilcocks, 5 Sergt. & R., 48; Bank of Missouri *vs.* Wright, 10 Missouri, 719; Scott *vs.* Bevan, 2 Barn & Ad., 78; Cash *vs.* Kennion, 11 Vesey, 314; Edwards on Bills, 726-9; 1 Parsons N. & B., 664.

<sup>2</sup> Grant *vs.* Healey, 3 Sumner, 523, Story, J., saying: "But the rate of exchange it not recoverable on a note when the venue is laid in the State where suit is brought, and there is no count or allegation to cover the difference of exchange:" Grutacap *vs.* Woulluisse, 2 McLean, 581.

<sup>3</sup> Martin *vs.* Franklin, 4 Johns., 124; Day *vs.* Scofield, 20 Johns., 102; Adams *vs.* Cordis, 8 Pick, 260; Lodge *vs.* Spomer, 8 Gray, 166.

<sup>4</sup> Laing *vs.* Barclay, 3 Stark, 1 Barr & Cres., 399; Story on Bills, § 399; Chitty on Bills (13th Amer. ed.), \*687.

<sup>5</sup> Bangor Bank *vs.* Hook, 5 Greenleaf, 174; Warren *vs.* Combs, 20 Maine, 139.

<sup>6</sup> Hargons *vs.* Lahens, 3 Sanford, 21, Sanford, J.: "The liability for damages becomes perfect on the return of the protested bill. A subsequent part payment by the acceptor can have no greater influence than a similar part payment by the drawer or any other party. It is as fixed and determinate an obligation as the debt represented by the sum expressed in the bill itself."

<sup>7</sup> Chitty on Bills, \*684.

like manner, for the Charges of Protest, Postage, and Provision.<sup>1</sup> "With respect to Provision," observes Mr. Chitty, "it is said by Pothier that it is usual for the holder of a bill to allow his agent, to whom he indorses it for the purpose of receiving payment for him, a certain sum of money called 'provisions' at the rate of so much *per cent.* to recompense him, not only for his trouble, but also if such agent be a banker, for the risk he runs of losing the money which he is obliged to deposit with his correspondents in different places for the purpose of repaying his principal the amount of the money received on the bills. And it is said that one-half *per cent.* is not an unreasonable allowance.<sup>2</sup> When it is necessary for the holder to send notice by a special messenger, his reasonable expenses are also chargeable upon the parties liable for payment."<sup>3</sup>

§ 20. Interest is recoverable against all the parties to a bill according to the law of the place where their several contracts were entered into or to be performed. And neither interest, or re-exchange, or damages in lieu thereof, need be specially claimed in the declaration as they flow out of the contract.<sup>4</sup> But charges of protest, postage, and other necessary expenses, can only be recovered upon a special count which covers them.<sup>5</sup> And protest must be alleged in order to the recovery of damages as they accrue only on the protest.<sup>6</sup>

§ 21. The owner or indorser who is compelled to pay the bill can not charge the costs of suit to prior parties, for they arise as well from his breach of contract to pay the bill, as from that of the principal party, and not from his indorsement.<sup>7</sup> But it has been said that if he is an accommodation party, he may charge to the person accommodated, not only the face of the paper, but the costs of an action against him.<sup>8</sup>

§ 22. It has been held in California that damages on bills do not accrue from any stipulation in the contract, but are recoverable by mere operation of law; and that they are therefore a mere incident to the principal sued for, and where the latter can not be recovered, there can be no claim for the former. If the drawee should pay only the principal sum after dishonor of the bill, the

<sup>1</sup> Chitty on Bills [\*634], 765.

<sup>2</sup> *Ib.*, [\*688], 770.

<sup>3</sup> Pearson *vs.* Crallan, 2 Smith's Rep., 404; Chitty, J., 715.

<sup>4</sup> Bank U. S. *vs.* U. S., 2 Howard, 711. <sup>5</sup> Kendrick *vs.* Lomax, 2 Crompt. & J., 405.

<sup>6</sup> Jordan *vs.* Bell, 8 Porter, Ala., 53.

<sup>7</sup> Dawson *vs.* Morgan, 9 B. & C., 618; Simpson *vs.* Griffin, 9 Johns., 131.

<sup>8</sup> 1 Parsons N. & B., 663.

right to demand damages against the drawer having already accrued, the liability of the drawer to pay them would remain. But if the holder surrender up the bill to the drawer, on payment of the principal by him, it would operate as a waiver of all claim for damages, the evidence of the debt being surrendered up and cancelled. And where there are two or more of a set of bills, the acceptance of payment of the principal of one would waive damages as to another of the set which had been presented, and refused payment, as all of the set constitutes in fact but one bill.<sup>1</sup> The result arrived at in the case cited seems correct; but the view taken that damages do not inhere in the contract is not in consonance with other authorities, nor as we think, correct.<sup>2</sup>

JOHN W. DANIEL.

Lynchburg, Va.

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<sup>1</sup> Page *vs.* Warner, 4 California, 395.

<sup>2</sup> See *ante* § 2.

*Digest of English Law Reports for December, 1873,  
and January, 1874.*

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[COMMON LAW, EQUITY AND APPELLATE SERIES.]

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ACQUIESCENCE.

Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed: *Earl Beauchamp v. Winn*, E. & I. Appeals, vol. vi, 223.

ADVANCEMENT.

A testator devised real estates upon trust for his daughter, E. C., for life, with remainder to her husband, W. C., for life, with remainder to trustees for one thousand years, to raise £30,000 for portions for younger children, with remainder to E. C.'s eldest son for life, with remainders over. And he directed that if E. C. or W. C., or either of them, should at any time during their joint lives, or the life of the survivor of them, advance or pay any sum or sums of money for the use or benefit of any younger child or children for whom portions were provided, then and in such case, unless the contrary should be directed by E. C. and W. C., or the survivor of them, by deed or writing to be sealed and delivered in the presence of one or more witnesses, the sum or sums so advanced should be taken in satisfaction *pro tanto* of the portion or portions of such child or children.

E. C. had several children, one of whom, J., was of weak mind; and while she was still under age, W. C. and E. C., and their eldest and second sons, executed a deed whereby they covenanted that if the share of J. devolved upon them, or any of them, they would divide it among the other younger children. J. attained twenty-one and died, and her share thus devolved on her father, W. C., and became subject to his covenant.

W. C., having survived his wife, made a will whereby he gave legacies to his younger children, and gave the residue of his personal estate for the benefit of two of them:

*Held* (reversing the decision of the Master of the Rolls), that none of the gifts under W. C.'s will were to be taken toward satisfaction of the portions of the younger children:

*Held*, also (affirming the decision of the Master of the Rolls), that the division of the share of J. was not to be taken toward satisfaction of the portions of the younger children.

*Twisden v. Twisden*, 9 Ves., 413; *Leake v. Leake*, 10 Ves., 477; *Onslow v. Mitchell*, 18 Ves., 490; and *Golding v. Haverfield*, 13 Price, 593, commented on; *Cooper v. Cooper*, vol. viii., L. C. & L. JJ., 813.

AGREEMENT.

Where, in the making of an agreement between two parties, there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favor of interposing to grant relief.

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The court of equity will not, if such a ground for relief is clearly established, decline to grant relief merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition.

What is the nature of a mistake and what has been the cause of it, will be considered in determining whether relief ought to be granted. The rule *ignorantia juris neminem excusat*, applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case it is not decisively a ground for refusing relief: *Earl Beauchamp v. Winn*, E. and I. Appeals, vol. vi., 223.

#### BILL OF EXCHANGE.

A representation, by the drawer, that bills of exchange drawn upon L. will assuredly be paid, for that the drawer has previously remitted to L. funds to a much larger amount, in consequence of which representation B. purchases those bills from the drawer, does not amount to an equitable assignment by the drawer of the funds in the hands of L., nor to a specific appropriation, out of those funds, of the amount of each of those bills.

Where, therefore, such an assurance had been given, and the funds in the hands of L. were larger than the amounts of the bills drawn upon him, but a bankruptcy of the drawer took place before the bills were payable, L. was held to be justified in refusing to pay the particular bills, and in handing over the funds to the legally appointed receiver of the bankrupt's estate, who demanded them on behalf of the general creditors of the drawer.

L. was a banker in England, and had dealings with N. O., a banker and bill dealer in America. The course of business was that N. O. remitted funds to L., and then drew bills on L., and sold those bills in America to persons who wished, in that way, to make payments in England. N. O. had represented to intending purchasers of these bills that they would certainly be paid, for that "the bills were drawn expressly [or "specially"] against funds to a much larger amount already remitted to L.," and on the faith of this assurance they were purchased:

*Held*, that this did not amount to a contract entitling the purchaser of any one of the bills to a specific portion of the funds in the hands of L.

The application of the rule in *Jorden v. Money*, 5 H. L. C., 185, as to the distinction between representations of intention and of fact, approved: *Citizens' Bank of Louisiana v. Bank of New Orleans*, E. and I. Appeals, vol. vi., 352.

#### BILL OF LADING.

A bill of lading, in mentioning the freight payable for a cargo, did not use the ordinary words "he or they paying freight for the same," but, after giving the names of the consignees to whose order the cargo was to be delivered, employed the words "freight for the said goods £4 5s per ton of 20 cwt. net, delivered, with primage and average accustomed," etc.:

*Held*, that the two forms of expression were in effect the same, and constituted the ordinary condition that the goods were to be delivered only on paying freight.

Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, and the goods are by the bill of lading deliverable to their order.

The holders of a bill of lading can not, as against the assignees of the freight, set off a debt due to them from the original owner of the goods, who was also the assignor of the freight: *Weguelin v. Cellier*, E. and I. Appeals, vol. vi., 286.

BILL SENT BY POST.

The rules of the French Office permit a person who has posted a letter to recover it at any time before it is dispatched from the office where it is posted on complying with certain forms. Therefore, where a letter containing bills of exchange, indorsed to the person to whom the letter was addressed, was posted in a French post office:

*Held*, that the property in the bills did not pass to the indorsee till the letter had left the office where it was posted.

C., a banker of Lyons, having received from D. a bill drawn on a firm in Milan, posted a letter addressed to D. in England, inclosing five bills of exchange indorsed to him. Before the mail left Lyons, C. received a telegram from D.'s agent at Milan, stating that the drawee of the bill refused to accept it, and telling him not to send any remittance to D. C. accordingly applied to the post office for a return of the letter containing the five bills; but through a mistake of his clerk the letter was not returned to him, but was dispatched to England and delivered to D., who soon afterward filed a petition for liquidation:

*Held*, that as C. had shown an intention of recalling the letter before it left Lyons, which had only been frustrated by a mistake of his clerk, the property in the bills did not pass to the indorsee, and that they must be given up to C.:

*Held*, also, by Mellish, L. J., that even if the property in the bills had passed where the letter was posted, the delivery of the bills was revoked by both parties, and that the fact of their not actually getting back into the manual possession of the indorser through a mistake of the clerk made no difference: *Ex parte Cote. In re Dezeze*: L. C. & L. J. M., vol. ix., 27.

CHARITY.

Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more. "Reparation" of premises, used in a gift of those premises to a charity, must be held to comprehend their restoration in the event of any catastrophe befalling them: *The Attorney-General vs. Wax Chandlers' Company*, E. and I. Appeals, vol. vi., 1.

CHILD IN VENTRE SA MERE.

A testator gave a fund to his wife for life, then to his daughter (a married woman) for life, and after her death to her children, who being sons should attain the age of twenty-one, or being daughters, attain that age or marry, and if none, then to certain persons by name. By a codicil he directed that if his daughter should be living at the expiration of five years from the death of his wife, and should not then have had any child or children, the fund should be at once divided between the ulterior takers, as if his daughter were dead without children. The daughter's first child was born five years and six months after the death of the testator's widow:

*Held* (affirming the decision of Wickens, V.C.), that as the daughter had a child *in ventre sa mere* within five years after the death of the widow, the gift over had not taken effect: *Pearce vs. Carrington*, L. JJ., vol. viii., 969.

COLLATERAL AGREEMENT.

Fraud can not be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length.

An agreement rendered inoperative by a collateral fraudulent agreement can not be made valid by the abandonment of the collateral agreement.

Agreements, though prepared by an independent solicitor, may be set aside if that one of the parties for whom the solicitor is acting is under the undue influence of the other party.

Where material allegations of fraud are proved, the plaintiff will obtain relief although other allegations of fraud may not be proved.

Decree of Malins, V.C., reversed : *Moxon v. Payne*, L. JJ., vol. viii., 881.

#### COMPANY.

A director of a joint-stock company is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company.

So, if, acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company.

Where the articles of a joint-stock association declared that if a director had any interest in a contract proposed for acceptance by the association, he should declare his interest, or his place as director should be vacated, and having declared it he should not vote on the proposal :

*Held*, first, that "declare his interest" meant declare the nature of his interest, and that the words were not satisfied by a mere declaration that he had an interest in the matter;

And, secondly, that the vacating of the seat would not prevent the contract itself from being treated as one made for the benefit of the association, for that the rule of equity would apply to such a case in addition to the penalty specially mentioned by the article of association : *Imperial Mercantile Credit Association v. Coleman & Knight*, E. and I. Appeals, vol. vi., 189.

#### CONDITIONS OF SALE.

By a deed of the year 1858, lands were conveyed to trustees on the usual trusts for sale. The trustees were unable to find a deed of 1819, through which the conveying parties to the deed of 1858 derived their title; and put up the lands for sale by auction under a condition that the title should commence with the deed of 1858, and that no earlier title should be called for except at the purchaser's expense. The lands were sold at the auction, the object of the condition being explained in the auction room. A suit to restrain completion was instituted by one of the *cestui que trust* against the trustees and the purchaser. Some time after the institution of the suit, the deed of 1819 was found :

*Held* (affirming the decision of Malins, V.C.), that this condition was calculated to depreciate the property at the auction, and was inserted without any reasonable ground :

*Held*, that the Court would, at the suit of a *cestui que trust*, restrain the purchaser from completing the sale :

*Held* (reversing the decision of Malins, V.C.), that the smallness of the interest of the plaintiff, and the fact that she was an infant, and that the suit might have been instituted on other motives, were not reasons against granting an injunction to restrain completion : *Dance v. Goldingham*, L. JJ., vol. viii., 902.

#### CONTRACT.

1. The plaintiffs advertised for tenders for the supply of stores for a period of twelve months. The defendant sent in a tender to supply the stores required for the period named, at certain fixed prices, "in such quantities as the company's store-keeper might order from time to time;" and the plaintiffs accepted his tender :

*Held*, that there was a sufficient consideration for the defendant's promise to sup-

ply the goods, although there was no binding contract on the part of the company to order any: *Great Northern Railway Company v. Witham*, C. P., vol. ix., 16.

2. The plaintiff and defendant were both subscribers to a charity, the objects of which were elected by the subscribers who had votes proportioned in number to the amount they had subscribed. They expressly agreed that if the plaintiff would give twenty-eight votes for an object of the charity whom the defendant favoured, the defendant would at the next election give twenty-eight votes for such object of the charity as the plaintiff should then favour:

*Held*, that there was a legal consideration for the defendant's promise, and that the agreement was not void as against public policy: *Bolton v. Madden*, Q. B., vol. ix., 55.

3. On a sale of goods, the invoice expressed that they should be paid for in "from six to eight weeks." The sale took place on the 1st of May, and the action for the price was commenced on the 18th of June. At the trial the judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks;" and they found that the action had not been brought prematurely. The judge, being of the same opinion, directed a verdict for the plaintiff:

*Held*,—upon the authority of *Alexander v. Vanderzee*, Law Rep., 7 C. P. 530,—that the question was properly left to the jury, and the verdict right: *Ashforth v. Redford*, C. P., 20.

#### COVENANT.

If the directors of a railway company become, for the purposes of the company, lessees of land, with a privilege to use docks, and agree to pay rent and royalties to the owner of the docks, and enter into other conditions which, by a state of circumstances subsequently created, appear to be unreasonable and impolitic, such stipulations and conditions can not, on that account, be treated as *ultra vires* of the directors.

Nor can a condition to pay shipping dues, not only for goods actually brought along the railway and shipped at those docks, but for goods brought along the railway to be shipped at other docks, be treated as a covenant in restraint of trade: *Taff Vale Railway Company v. Macnab*, E. and I. Appeals, vol. vi., 169.

#### CUMULATIVE LEGACIES.

A testator gave two legacies of £5000 each to the same person by two codicils executed at the same time, and in nearly the same words, neither codicil comprising any other legacy. One instrument he sent to his solicitor, and the other he sent to the legatee. Three years afterwards he withdrew the codicil held by his solicitor and sent it also to the legatee. He had previously executed his will in duplicate, sending one copy to his solicitor and the other to the principal beneficiary:

*Held*, that the legacies given by the two codicils were substitutional and not cumulative: *Whyte v. Whyte*, V.-C. M., vol. xvii., 50.

#### CUSTOM OF STOCK EXCHANGE.

Stock-brokers who have with their own money purchased stock for a principal are, in the event of the death, bankruptcy, or insolvency of the principal, justified in immediately selling the stock. Under such circumstances the stock-brokers have a claim against the estate of the principal for the balance due to them on the account, which balance is subject to deduction for any loss which may have been incurred by selling before the next settling-day.

Decision of Lord Romilly, M.R., affirmed: *Lacy v. Hill, Scrimgeour's Claim*, L. J.J., vol. viii., 921.

## DEATH COUPLED WITH A CONTINGENCY.

A testator gave a fund to his widow for life, and after her death upon trusts in moieties for his two daughters during their respective lives, with ulterior trusts for their children respectively, and limitations in default of children of either, upon the trusts of the other moiety; and if neither daughter should have child who should become entitled, then upon trust for his two sons, to be equally divided between them, their respective executors, administrators, and assigns; but if either of them died without issue living at his decease, then the whole to be in trust for the other of them, his executors, administrators, and assigns; and if both of them died without issue living at their respective deaths, then the fund should be in trust for Mrs. S., her executors, administrators and assigns; but if she should die without leaving issue at her decease, then it should be in trust for the daughters of P. D. living at the determination of the prior trusts. The testator's daughters survived the widow, and died childless. The sons both died without issue in the life time of the surviving daughter, who became tenant for life of the whole. Mrs. S. survived the daughters, and afterward died without issue, upon which the representatives of a daughter of P. D., who had survived Mrs. S. only one day, claimed the fund:

*Held* (reversing the decision of Malins, V. C.), that Mrs. S., having survived the tenants for life, took an absolute indefeasible interest, and that the gift over to the daughters of P. D. did not take effect; for that if a fund is given to A. for life, and then to B., with a gift over if B. dies without issue, death without issue in the lifetime of A. is taken to be intended, unless there is a context extending it to death without issue at any time.

The canons in *Edwards v. Edwards*, 15 Beav., 357, approved: *In re Heathcote's Trusts*: L. JJ., vol. ix., 45.

## DELEGATION OF STATUTORY POWERS.

The H. Railway Company, whose line ran into the defendant company's line at B., had a parliamentary right to use the defendant's station at B.

The plaintiff company had running powers over the defendants' line, and were anxious to run trains through the B. station over the H. line. The H. company applied to Parliament for power to lease their line to the plaintiffs, but through the opposition of the defendants the proposed bill was thrown out. The H. company then entered into an agreement with the plaintiffs, terminable on six months' notice, by which they agreed to allow the plaintiffs to use the H. line and all its stations, sidings, etc., and to afford them every facility for so doing; the plaintiffs to keep the line in repair, and appoint and pay their own officers, and fix the rates and fares of through traffic, paying to the H. company a proportion of the through rates and fares by way of commuted toll. It was also provided that if the H. company should desire the plaintiffs to undertake the local traffic of the H. line the plaintiffs would do so, paying the H. company a proportion of the fares.

The plaintiffs under this agreement claimed the right to run their trains over the defendants' junction at B., and filed their bill to establish the right, which the defendants resisted, on the ground that the agreement between the plaintiffs and the H. company was *ultra vires* and illegal:

*Held* (reversing the decision of the Master of the Rolls), that the agreement was not *ultra vires* or illegal, and that the plaintiffs were entitled to the relief prayed: *Midland R. R. Co. v. Great Western R. R. Co.*: L. JJ., vol. viii., 841.

## DEPOSIT OF DEEDS.

The plaintiff handed title deeds to his brother to enable the brother to borrow

£1000 from H. The brother deposited them at his bankers, with a memorandum of deposit purporting to be executed by the plaintiff, and addressed to them, "in consideration of your lending F. B. (the brother) £1000 for seven days from this date I deposit," etc. The bankers did not place £1000 to the credit of the brother, but during the next seven days they allowed him, by checks drawn in the ordinary way, to overdraw his account to an amount somewhat less than £1000. The plaintiff filed his bill for delivery up of the deeds, alleging the memorandum of deposit to be a forgery, and also alleging that the bank had not lent the brother £1000 for seven days:

*Held* (affirming the decision of the Master of the Rolls), that, assuming the memorandum to be genuine, the bankers had no lien on the deeds, for that they had not fulfilled the condition: *Burton v. Gray*, L. JJ., vol. viii., 933.

#### EXECUTOR DE SON TORT.

The legal personal representative of a testator is a necessary party to a suit for the administration of his real and personal estate; and if he is not made a party, no decree can be made in such a suit, even although an executor *de son tort* and the trustees of the real estate are before the Court.

*Raymer v. Kahler*, Law Rep. 14, Eq. 262, and *Coote v. Whittington*. Law Rep. 16, Eq. 534, dissented from.

Where it is plain on the face of the bill that a suit is defective for want of parties, a defendant raising the objection at the hearing is entitled to the costs of the day, although he may not have taken the objection by his answer: *Rousell v. Morris*, M. R., vol. xvii., 20.

#### FRAUDULENT REPRESENTATION.

The particulars of the plaintiff's claim, in an action in a county court, were as follows: "The plaintiff sues the defendant in tort for legal fraud and deceit committed under the following circumstances: for that the defendant, in March, 1872, caused to be inserted in a public newspaper an advertisement for the letting by tender, with immediate possession, of a farm; and the plaintiff, believing in the bona fides of such advertisement, and desiring to become tenant of a place of the description advertised, did take trouble and pains, and incurred expense in going to and inspecting the property, and in the employment of persons to inspect and value it for him, with a view of becoming tenant thereof, whereas afterward it appeared that the defendant had no power to let the property as advertised, and caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement. And that the defendant knew, at the time he caused such advertisement to be published, that he had not the power to let the farm, and that the farm was not to be let." The county court judge ruled that the particulars disclosed a cause of action, and non-suited the plaintiff:

*Held*, that the particulars contained allegations amounting to a fraudulent representation, for which an action would lie: *Richardson v. Sylvester*, Q. B., vol. ix., 34

#### INCOMPLETE GIFT.

W., the uncle of the plaintiff's wife, was applied to by a friend of the plaintiff to advance £1000 to defray some expenses connected with the plaintiff's election as Member of Parliament. W. declined to make the advance, but said he would give the plaintiff £500, and deduct it from the legacy he intended to leave to his wife. Shortly afterward W. sent the plaintiff a check for £500. The plaintiff wrote to thank W., saying that he would gladly repay it at an early opportunity, and hoped shortly to be able to do so. A few weeks afterward, as the plaintiff deposed, a conversation took place between him and W., and it was agreed at the plaintiff's in-

stance that the plaintiff should pay banker's interest on the sum during W.'s life; and the plaintiff, for the purpose, as he deposed, of effectuating this agreement, signed and gave to W. a promissory note for £500, with interest at £1 per cent., on the understanding that payment of the principal was not to be enforced, but only payment of interest, during W.'s life. After W.'s death his executors sued the plaintiff on the note for the £500:

*Held* (reversing the decision of Malins, V. C.), that (although, if there had been a complete gift of £500, it could not afterward have formed a consideration for a promissory note) the executors were entitled to recover; for that, as the plaintiff had not, before the giving of the promissory note, agreed to accept the £500 as a gift, it remained open whether it should be a gift or a loan; and the giving the promissory note was conclusive evidence that the parties agreed upon its being a loan; and the court could not allow the documentary evidence to be rebutted by the parol evidence given by the plaintiff on his own behalf.

*Per James, L. J.:* Evidence of a plaintiff on his own behalf as to a bargain with a man since dead ought, in the absence of corroboration, to be disregarded: *Hill v. Wilson*, L. JJ., vol. viii., 888.

#### INSURANCE.

It is a principle of insurance law that no abandonment is necessary where there is nothing which, on abandonment, can pass to or be of value to the underwriters. Where, therefore, there was a policy on ship, and also on charter-party freight (that is, freight to be earned by the carriage homeward of a cargo chartered to be put on board at a distant port), and the ship was so injured on the outward voyage that the ship-owner abandoned to the underwriter on ship, there was nothing to pass to the underwriter on charter-party freight, and, consequently, there was no necessity for abandonment to him.

The damage to the ship from perils of the sea during the voyage, covered by the policy on ship, being such as to justify abandonment to the underwriter on ship before the cargo was put on board, the insured freight could not be earned, and there would therefore be a total loss on the policy on freight: *Rankin v. Potter*, E. & L. Appeals, vol. vi., 83.

#### MANAGEMENT BY TRUSTEES.

After an administration decree has been made all powers of management of the estate which may be vested in trustees are subject to the control of the Court; and the judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees.

Trustees having power to invest certain moneys belonging to a testator's estate at their discretion, and having also power to continue or change securities from time to time, as to the majority should seem meet, applied to the Court in a suit for the administration of the trust estate for liberty to invest the moneys in and to convert securities into American funds or railway stocks. Infants were interested in the trust estate:

*Held*, that if the trustees had the discretion they claimed (which was doubtful), the Court ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed. *Bethel v. Abraham*, M. R., vol. xvii., 24.

#### MORTGAGE BY DEVISEE.

Where a testator directs all his debts to be paid, and afterwards devises real estate to a devisee specially charged with debts and legacies, the devise supercedes the

power of sale in the executors, and the devisee can give a good title to the estate and a good discharge to a mortgagee, who has no notice of a breach of trust, without the executors joining.

Decision of the Master of the Rolls reversed: *Corser v. Cartwright*, L. JJ., vol. viii., 971.

●  
"NEPHEWS AND NIECES."

Residuary gift in trust for "my nephews and nieces living, and the issue, if any, of my nephews and nieces dead before me." The testator never had any nephew or niece of his own, nor had he any brother or sister living when he made his will:

*Held* (affirming the decision of the Master of the Rolls), that the nephews and nieces of the testator's wife took under the gift, and that evidence of circumstances making it improbable that the testator intended to benefit them, but not tending to show that any other class was intended, was inadmissible: *Sherrat v. Mountford*, L. JJ., vol. viii., 928.

PARTNER.

C. was held liable to refund to an association, of which he was both a member and a director, money which he had unlawfully received by taking an increased commission on work of the association contracted to be done by himself.

C. had a partner, K., who was not in any way connected with the association; the transaction, however, had been a partnership transaction:

*Held*, that the partners were liable, jointly and severally, to make good to the association the profits which it ought to have received in the increased amount of the commission: *Imperial Mercantile Credit Association v. Coleman & Knight*, E. & I. Appeals, vol. vi., 189.

PROBATE DUTY.

When a will contains an absolute trust for the conversion of land, and, by reason of the failure of the limitations of the proceeds contained in the will, the testator's heir takes the undisposed-of interest, he takes it as money, and on his death probate duty is payable upon it, although the land still remains unsold. C. J. B. by his will directed his real estate to be converted, and the proceeds, with his personalty, to be held in trust for the payment of debts and legacies, and, as to the residue, on certain trusts which failed. The testator's heiress, M. B., became, by reason of the failure of the last mentioned trusts, entitled to the proceeds of the real estate. She died under twenty-one, and at the time of her death the real estate was unsold:

*Held*, that the interest which M. B. took as heiress of C. J. B., was taken by her as money, and that probate duty was payable by her administrator in respect of it: *Attorney-General v. Lomas*, Ex., vol. ix., 29.

PROOF FOR JOINT DEBT.

Where a joint and several covenant is entered into by partners for payment of a debt, and there is nothing in the instrument to show that they were jointly contracting as partners, parol evidence may be admitted to show that the money was used for partnership purposes, and if that is established, proof may be made in bankruptcy against their joint as well as their separate estates.

A covenant to pay a sum of money when requested by A., or after his death by the covenantee, with interest in the meantime, creates a present debt which may be proved for in bankruptcy.

A debtor, before his bankruptcy, covenanted to pay a sum of money which was due to his father to a trustee to whom the father assigned it; and trusts were declared of the money, under which the debtor took a reversionary interest:

*Held*, that the trustee of the settlement could prove for the whole amount without deducting the debtor's interest: *Ex parte Stone*; *In re Welch*, L. JJ., vol. viii., 914. PROVISIO.

A proviso in a will being at the end of all the devises, must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only: *Giles v. Melsom*, E. & I. Appeals, vol. vi., 24.

#### RELIEF FROM FORFEITURE.

A company incorporated by Act of Parliament for making a dock, agreed with a land-owner to purchase a piece of land for £4,000, of which £2,000 was to be paid at once, and the remaining £2,000 on a future day named in the agreement, with a provision that if the whole of the £2,000 and interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might re-possess the land as of their former estate, without any obligation to repay any part of the purchase money:

*Held* (affirming the decision of the Master of the Rolls), that this stipulation was in the nature of a penalty, from which the company was entitled to be relieved on payment of the balance of the purchase money, with interest.

Per James, L. J.: *Semble*, that if, on the true construction of the agreement, this stipulation had not been merely in the nature of a penalty, it would have been void as *ultra vires*: *In re Dagenham (Thames) Dock Company*; *Ex parte Hulse*, L. JJ., vol. viii., 1022.

#### SOLICITOR'S LIEN.

Solicitors for the trustees of an estate which is under the administration of the Court have not, after their discharge, such a lien for costs and money advanced in the suit as will enable them to refuse production of documents which are required by the receiver for the management of the estate.

Order of Bacon, V. C., affirmed: *Belaney v. French*, L. JJ., vol. viii., 918.

#### STATUTE OF FRAUDS.

The defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her, verbally, to pay her £300 per annum, by equal quarterly installments, for so long as she should maintain and educate the children. At the time of the making of the promise, the eldest child was about fourteen years old:

*Held*, that this agreement was not one "not to be performed within a year from the making thereof," within the meaning of the Statute of Frauds, section 4, and was, therefore, binding, though made by parol only. Per Bramwell and Pigott, BB.: The agreement was one which might at any time have been terminated by either party giving notice to the other. The claim in a declaration may be amended under the Common Law Procedure Act, 1852, section 222, by the judge at the trial: *Knowlman v. Bluett*, Ex., vol. ix., 1.

#### TENANT BY CURTESY.

R. A., being a tenant by curtesy of certain premises, devised them by his will to trustees for his daughter Rebecca for life, with remainder to his grandson William. Upon the death of the testator, Rebecca entered into possession of the premises purported to be devised, and paid for some years certain annuities charged by the will upon the premises, and was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. William conveyed his remainder to the plaintiff. Rebecca, after she had been in possession more than twenty years, conveyed the premises in fee to the defendant, who, upon her death, took possession.

The plaintiff, the assignee of William, the remainderman, having brought ejectment:

*Held*, that Rebecca having entered under the will, the defendant claiming through her was estopped as against all those in remainder from disputing the validity of the will, and that the plaintiff was entitled to recover: *Board v. Board*, Q. B., vol. ix., 48.

#### WILL.

The word "children" used in a will *prima facie* means legitimate children, and no other meaning can be given to it by any conjectural application of other words found in the will and supposed to show the testator's intention; there must be clear evidence of that intention in the will itself to establish another application of the word.

There may be a gift to living illegitimate children as a class, if the words used by the testator clearly show that such children were intended to be the objects of his bounty.

But whether any such gift to future illegitimate children can take effect *quære?*

If there is a gift to "children" as a class, the law, if there is nothing in the will clearly to show a contrary intention, will apply the gift to legitimate children only: *Hill v. Crook*, E. & I. Appeals, vol. vi., 265.

#### WILL OF MARRIED WOMAN.

A married woman having separate estate, and having under her marriage settlement a power of appointment in the event of her dying in the life-time of her husband, made a will with the assent of her husband, and survived her husband:

*Held*, that though the will passed the separate estate, it did not execute the power of appointment, nor pass property acquired by the wife after the death of her husband:

*Held*, that the death of a husband operates as a revocation of his assent to the will of his wife.

Decree of Bacon, V. C., reversed. Observations on *Noble v. Phelps* (Law Rep., 2 P. & D., 276): *Noble v. Willock*, L. C. & L. JJ., vol. viii., 778.

# Digest of United States Supreme Court Reports.

[From 16 Wallace.]

## COMMON CARRIER.

1. When goods are delivered to a common carrier to be transported over his railroad to his depot in a place named, and there to be delivered to a second line of conveyance for transportation further on, the common-law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. His obligation, while the goods are in his depot, does not become that of a warehouseman: *Railroad Company v. Manufacturing Company*, 318.

2. Although a common carrier may limit his common-law liability by special contract assented to by the consignor of the goods, and unsigned general notice printed on the back of a receipt, does not amount to such a contract, though the receipt with such notice on it may have been taken by the consignor without dissent: *Ib.*

3. The Court expresses itself against any further relaxation of the common-law liability of common carriers: *Ib.*

## CONDITION.

How far a grant by a State loyal at the time, on condition that certain things shall be done, is absolved from the condition by the State going into rebellion, and by the rebellion rendering the performance by the grantee of the condition impracticable: *Davis v. Gray*, 203.

## CONFLICT OF JURISDICTION.

*Between the Federal Court and State Officers.*—A Circuit Court, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States: *Davis v. Gray*, 203.

## CONSTITUTIONAL LAW.

1. A license tax by a city of one State of a business carried on within the city, of an express company chartered by another State, which business so licensed included the making of contracts within the first-named State for transportation beyond its limits is not a tax on inter-state commerce, and is constitutional: *Osborne v. Mobile*, 479.

2. An exemption from taxation granted by one legislative act to a railroad company, as an inducement to it to build its road, can not by a subsequent one be taken away: *Humphrey v. Pegues*, 244.

3. The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. This embraces those laws alike which affect its validity, construction, discharge and enforcement. The remedy or means of enforcing a contract is a part of that "obligation" of a contract which the Constitution protects against being impaired by any law passed by a State. And so, if a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial

tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity: *Walker v. Whitehead*, 314; *Olcott v. The Supervisors*, 678.

#### DEPOSIT.

The rule that where *money* has been deposited with a bank, the bank where the deposit is made becomes the owner of the money, and consequently a debtor for the amount, and under obligation to pay on demand, not the identical money received, but a sum equal in legal value, does not apply where the thing deposited is not *money*, but a commodity, such as "Confederate notes," and it was agreed that the collection should be made in like notes: *Planters' Bank v. Union Bank*, 483.

#### DURESS.

Where the agents of the rebel Confederacy came to persons owning iron-works, and informed them that they must either contract to furnish iron at a uniform price, or lease or sell the works to the Confederacy, or that they would be impressed, and the owners (then much in debt) after consultation, the works being already in charge of a guard from the Confederacy, which possessed despotic power over skillful laborers, considering that to "contract" would cause a failure of their scheme, and to lease would be ruinous, resolved to sell:

Held, that such a sale was not made under duress: *United States, Lyon et al. v. Huckabee*, 414.

#### EVIDENCE.

1. Notices required by statute presumed to have been given by a probate judge, he having made a conveyance of land which could have been properly made only after such notices given: *Cosfield v. McClelland*, 331.

2 An "agreement of record" not made part of the record by the pleadings, may be received as evidence in a suit in equity, though it might not be in a suit at law: *Burke v. Smith*, 390.

3. Where improper evidence has been suffered by the Court to get before the jury, it is afterwards properly withdrawn from them: *Specht v. Howard*, 564.

4. On a suit by the indorsee of a negotiable note which has no place of payment specified in it, against the indorser who relied on a confessedly defective demand on the maker, of payment; that is to say, on a fruitless effort at demand, in the place where the note was dated, but in which place the maker did not live, parol evidence that at the time when the note was drawn, it was agreed between the maker and the indorser that it should be made payable in the place where the effort to demand payment had been made, and that this place of payment had been omitted by the mistake of the draughtsman—being evidence to vary or qualify the absolute terms of the written contract—would be improperly let in to the jury, and, if let in, would be properly withdrawn: *Ib.*

#### "INSOLVENT."

Meaning of the term in the Bankrupt Law: *Buchanan v. Smith*, 277.

#### INTERNAL REVENUE.

1. The Court, in the absence of a clear, common conviction on the part of its members, as to meaning of a clause in a statute relating to the, adopted what was shown to have been the unvarying practical construction given to it by the commissioner of: *Peabody v. Stark*, 240.

2. Held accordingly, that under the 80 per cent. clause in the 20th section of the Act of July 20, 1868, the distiller is not liable until a survey in which the tax is assessed has been delivered to him as provided by the 10th section: *Ib.*

## JURISDICTION.

I. *Of the Supreme Court of the United States.*

## (a) It HAS jurisdiction—

1. Under the 25th section of the Judiciary Act, where, on a suit in one State, between a sheriff of that State and an assignee in insolvency appointed by the court of another State, to determine whether the sheriff, acting for an attaching creditor, or the assignee, has the prior right to certain personal property attached, the highest court of the State where the suit was brought decides that the right was with the sheriff: *Crapo v. Kelly*, 610.

## (b) It has NOT jurisdiction—

2. Of an appeal on a libel *in personam* for a collision by the owners of a schooner against the owners of a sloop that had been sunk in the collision; where the decree was for but \$1,292.84, and, therefore, "not exceeding the sum or value of 2,000." And this although prior to the libel *in personam*, the owners of the sloop had filed in another district a libel *in rem* against the schooner, laying their damages at \$4,781.84, and that in the District and Circuit Courts below, both cases might have been heard as one; the cases never having, however, been brought into the same district or circuit, nor in any manner consolidated: *Merrill v. Petty*, 338.

3. Nor under the 25th section of the Judiciary Act, of a case where neither the Record nor the opinion of the Supreme Court, which was in the Record, shows any question before that Court, except one relating to the interruption of a "prescription" (statute of limitations) set up as a defense, and the opinion shows that this question was decided exclusively upon the principles of the jurisprudence of the State: *Marqueze v. Bloom*, 351.

4. Nor under that section, nor under the second section of the Act of February 5, 1867, amendatory of it, of a case dismissed by a State court for want of jurisdiction in such court: *Smith v. Adit*, 185.

II. *Of the Circuit Courts of the United States.*

5. Where a proceeding in a State court is merely incidental and auxiliary to an original action there—a graft upon it, and not an independent and separate litigation—it can not be removed into the Federal courts under the Act of 2d of March, 1867, authorizing under certain conditions, the transfer of "suits" originating in the State courts: *Bank v. Turnbull & Co.*, 190.

6. The Circuit Court may, under the second section of the Bankrupt Act, entertain a bill as an original proceeding, a case involving a question of adverse interest in goods seized by the sheriff before any act of bankruptcy by the tenant, for rent due and held by him, the sheriff, as a pledge for the payment thereof, and claimed, on the other hand, by the assignee in bankruptcy of the tenant: *Marshall v. Knor*, 551.

## LIFE INSURANCE.

Walking, for a certain distance at the end of a journey,

*Held*, not to be traveling by either public or *private conveyance*, within the meaning of an accident policy of insurance on life while "traveling by public or private conveyance:" *Ripley v. Insurance Company*, 336.

## MARRIED WOMAN.

Under the laws of New York, may manage her separate property, through the agency of her husband, without subjecting it to the claims of his creditors; and when he has no interest in the business, the application of a portion of the income to his support will not impair her title to the property: *Voorhees v. Bonesteel and Wife*, 16.

MORTGAGE.

When held as security for the payment of negotiable paper, is not open, as against *bona fide* holders of the paper for value, to defenses to which the notes in their hands would not equally be open: *Carpenter v. Longan*, 271; *Kennicott v. The Supervisors*, 452.

NEGOTIABLE PAPER.

1. The assignment before maturity raises the presumption of want of notice of any defense to it; and this presumption stands till it is overcome by sufficient proof: *Carpenter v. Longan*, 271.

2. When a mortgage given at the same time with the execution of, and to secure payment of, is subsequently, but before the maturity of the paper, transferred *bona fide* for value, with it, the holder of the paper when obliged to resort to the mortgage is unaffected by any equities arising between the mortgagor and mortgagee subsequently to the transfer, and of which he, the assignee, had no notice at the time it was made. He takes the mortgage as he did the paper: *Ib.*; and see *Kennicott v. The Supervisors*, 452.

3. Where the United States issued its negotiable bonds (bonds payable to bearer) to a State which on receiving them passed (before the rebellion) a law that none of the bonds should be available in the hands of the holder, and then went into rebellion and repealed the law:

*Held*, notwithstanding what was said in *Texas v. White & Chiles* (7 Wall., 700), and *Texas v. Hardenberg*, (10 *Ib.* 68), that bonds un-indorsed issued in aid of the rebellion could not be recovered on. That no presumption arose from the absence of such indorsement on the bonds that they had been issued without authority, and for an unlawful purpose, and that the presumption that they had been issued with authority and for a lawful purpose was in favor of the holders of the bonds, especially after payment by the United States. That it was primarily the duty of the government (as the United States were the obligors in the bonds, and the rebellion was waged against *them*), to ascertain and decide whether bonds presented to and paid by it had or had not been issued and used in aid of the rebellion; and that after a decision in the affirmative the presumption was that the parties who held the bonds were entitled to payment against the reconstructed State of Texas. That whether an alienation of the bonds by the usurping government divested the title of the State, depended on other circumstances than the quality of the government; that if the object and purpose of it were just in themselves and laudable, the alienation was valid; but if, on the contrary, the object and purpose were to break up the Union and overthrow the constitutional government of the Union, the alienation was invalid: *Huntingdon v. Texas*, 402.

## SELECTED DIGEST OF STATE REPORTS.

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[For the present number of the REVIEW, selections have been made from the following State Reports: 47 Alabama, 27 Arkansas, 22 Grattan (Virginia), 58 Illinois, 40 Indiana, 37 Maryland, 52 Missouri, and 71 Pennsylvania.]

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### ABATEMENT.

It is error on overruling a demurrer to a plea in abatement, to the jurisdiction of the court, to permit plaintiff to reply to the plea, and such error is not waived by pleading in bar to the action. On overruling the demurrer to the plea, the court should quash the writ and abate the suit: *Spaulding et al. v. Lowe*, 58 Ill., 96.

### ACCORD AND SATISFACTION.

1. Payment of the principal of a debt, when received by the creditor in full satisfaction thereof, is a good defense as an accord and satisfaction: *Westcott v. Waller, guardian*, 47 Ala., 492.

2. Payment of part of a debt or liquidated damages is not a payment of the whole debt, even when the creditor agrees to receive a part for the whole and executes a receipt for the whole, except in fair and well understood compromises carried faithfully into effect, or if the payment is in any way more beneficial to the creditor than that prescribed in the contract: *Riley v. Kershaw*, 52 Mo., 224.

### ACCOUNT.

A bill in equity, filed by one partner against his insolvent co-partner in the business of carrying on a farm for one year, asking a settlement of the partnership accounts, and the foreclosure of a mortgage executed by the defendant partner on his share of the crop to be raised, to secure an individual liability to the complainant, is not obnoxious to the objection that there is an adequate remedy at law; nor is it demurrable for multifariousness, although several purchasers from the defendant partner of different portions of the crop, at different times, are united with him as defendants: *Monroe v. Hamilton et al.*, 47 Ala. Rep., 217.

### ACKNOWLEDGMENT.

1. The certificate is conclusive only of such facts as the magistrate is bound by the Statute to certify: *Williams v. Baker*, 71 Pa., 476.

2. The general rule as to certificates given by officers is that a certificate of fact not coupled with matter of law is not evidence: *Ib.*

3. If the officer is bound to record a fact, the proper evidence is a duly authenticated copy of the record: *Ib.*

4. If an officer's certificate is made evidence of certain facts, he can not extend its effect to other facts by stating them in it: *Ib.*

### ACTION.

1. If an administrator in North Carolina, on his final settlement there, is charged with, and accounts for a note, given to him as administrator, by a resident of Alabama, for property purchased at a sale of his intestate's estate, the note thereby be-

comes his property, and he may maintain an action on it in his own name, whether the sale was or was not made by authority of law: *Dunlap v. Newman et al.*, 47 Ala., 429.

2. The plaintiff in ejectment may declare for the entire interest, and recover an undivided moiety: *Jones' Heirs v. Walker, Ib.*, 175.

3. A contract in the form of a promissory note for the hire of a slave, may be declared on as a promissory note, notwithstanding, besides the promise to pay a sum certain in money, there is also a promise in the same instrument to furnish the slave with certain articles of clothing, pay his taxes, and return him to the owner at a stipulated time. Nor is it necessary that any notice be taken in the complaint of the latter stipulations, where no recovery is sought upon these stipulations: *Gains et al. v. Shelton, Ib.*, 413.

4. Where executors sell the lands of their testator, under an order of sale by the probate court for that purpose, if the vendee gives his notes for the purchase money and is let into, and retains the possession of the premises, he can not, at law, defend an action by the executors on said notes, on the ground that the order of sale is erroneous, even its utter invalidity is no defense to such an action: *Hickson et al. v. Singold et al., Ib.*, 449.

5. A warehouse receipt for cotton, subject to the order of the person in whose name the receipt is given, or the bearer, is an admission that the cotton belongs to such person, and in an action to recover the cotton, or its value, it is no defense that it has been shipped and sold by direction of a party who had obtained possession of the receipt without indorsement by the person stated to be the storer in the receipt and without authority from him to dispose of the same: *Lehman, Durr & Co. v. Marshall, Ib.*, 363.

6. Where a party has voluntarily paid a special assessment, the fact that others have failed to pay, or that the municipal authorities have abandoned the collection of other assessments in respect to the same improvement, will not aid the party who has paid in recovering back his money: *Falls v. City of Cairo*, 58 Ill., 403.

#### ADMINISTRATION.

Where a judgment was obtained in a Court of the United States, against an administrator in his fiduciary character, execution sued out, lands belonging to the estate sold, and marshal's deed to purchaser; on ejectment brought by purchaser,

*Held*, That a litigant obtaining a judgment, in a Court of the United States, against an administrator in his fiduciary character, can not proceed directly by execution against the estate, and any sale made or deed obtained, under such process, is invalid and worthless; but, the judgment creditor, as in cases of judgments in the State Courts, is remitted to the court of probate, there to receive payment or his *pro rata* out of the assets of the estate: *Yonley v. Lavender et al.*, 27 Ark., 252.

#### ADMINISTRATOR.

The fact that an administrator may have confessed a judgment, and thereby admitted a sufficiency of assets in his hands to pay the same, does not preclude the administrator *d. b. n.*, from pleading to a *scire facias* issued on such judgment, that the unadministered assets, with which alone he is chargeable, are insufficient to pay the judgment. Secus, in the case of the administrator of the administrator, who must show how he has paid away the estate, in order that the Court may see whether there were assets in his hands properly chargeable with the payment of the judgment: *Kearney v. Sacer et al.*, 37 Md., 264.

## AGENCY.

1. Statements of agents do not bind their principals, unless made at the time of the transaction so as to form part of it: *Golson v. Ebert*, 52 Mo. Rep., 260.

2. Individuals as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity: *Blakeman v. Hays*, *Ib.*, 578.

## AGENTS.

1. Where an authorized agent purchases land for his principal and advances the purchase money, not as a loan to him upon the security of the lands purchased, or for the purpose of converting the money into lands, but as an advance to the principal to enable the agent to accomplish the object of his principal, no trust will result in favor of the agent: *Byers et al. v. Danley*, 27 Ark., 77.

2. An agent has an implied or equitable lien enforceable within proper time, in equity, for advances, expenses, commissions, etc., made in the purchase of lands for his principal, and this lien is incident to the debt and continues in the agent so long as he has possession of the lands or title papers, but if he parts with the possession, or the debt be paid or barred by the statute of limitations, the lien is gone: *Ib.*

3. The president of a bank has no authority *virtute officii* to make any admissions which will release the maker of a note to the bank from his legal responsibility created by the note: *Hodges, Ex'r, v. First National Bank of Richmond*, 22 Grattan, 51.

4. An alien enemy may have an agent in the enemy's country to collect debts due him and preserve his property: *Hale v. Wall et al.*, 424; *Wall v. Slusher*, *Ib.*, 424.

5. An agent is appointed before the war to collect debts; his authority is not suspended because it is illegal to remit to his principal who is living outside of the Confederacy; but it is the duty of the agent to receive, and the duty of the debtor to pay: *Ib.*

6. The agent never used the money, but at once deposited it in the bank, he having no money of his own deposited there; and though the deposit was in his own name, he intending it for the benefit of his principal: This was not a conversion of the money to his own use, so as to make him debtor for the amount; but was under the circumstances, not improper; and he is not responsible for the loss: *Ib.*

7. Flagg employed Searle to sell land, the compensation to be all above \$125.00 per acre. Everhart agreed in writing with Searle to pay him \$500.00 for "services in assisting to negotiate a purchase" of the land. Searle brought Everhart and Flagg together, and a contract was made for the sale of the land at \$150.00 per acre. Everhart and Flagg afterwards consummated the sale themselves:

*Held*, that Searle acting for both without their consent could not recover the \$500.00 from Everhart: *Everhart v. Searle*, 71 Pa., 256.

8. Whatever an agent says or does in making a contract is evidence against the principal, being part of the contract: *Pennsylvania Railroad Company v. Titusville, etc., Plankroad Company*, *Ib.*, 350.

9. The admissions of an agent not made at the time of the transaction but subsequently are not evidence: *Ib.*

## ALIBI.

A charge that "the law regards evidence to prove an alibi among the weakest and most unsatisfactory of all kinds of evidence," is illegal. An alibi is a fact, and its existence in a criminal case is established by like weight of evidence that may be required as to any other fact: *Williams v. The State*, 47 Ala., 659.

#### ALIEN ENEMY.

While an enemy is incapable of suing and maintaining a suit, either at law or equity, in the courts of the country to which he is hostile, during the state of hostilities, he is liable to be sued, if within the reach of process: *Dorsey v. Thompson et al.*, 37 Md., 25.

#### APPELLATE COURT.

1. The decree of the Court of Appeals upon a question decided by the court below, is final and irreversible, and upon a second appeal in the cause the question decided upon the first appeal can not be reversed: *J. B. Campbell's Exr's, v. A. C. Campbell's Exr*, 22 Grattan, 649.

2. In such a case the conclusiveness of the decree of the Court of Appeals is the same, whether the first appeal was from a final or interlocutory decree of the court below. All the decrees of the appellate court are in their nature final; except, possibly, where that court disposes only of a part of the case at one term, and reserve it for further and final action at another: *Ib.*

3. Where the Court of Appeals makes a decree and sends the cause back for further proceedings, there can not be a bill of review to correct the decree of the Court of Appeals for errors apparent on the face of the record. But there may be such a bill to correct the decree on the ground of after-discovered evidence: *Ib.*

4. But to sustain a bill of review in such a case the greatest caution should be observed; and the new matters to be sufficient ground for reversal of the decree ought to be very material, and newly discovered, and unknown to the party seeking relief at the time the decree was rendered, and such as could not have been discovered by the use of reasonable diligence: *Ib.*

5. In a case of a prosecution for malicious shooting with intent to kill, where there has been a previous grudge and also an immediate provocation, it is for the jury to determine whether the shooting was induced by the previous grudge, or the immediate provocation; and it is not for the Appellate Court to reverse their judgment, which the judge who tried the case declines to set aside: *Read's Case, Ib.*, 924.

#### APPROPRIATION.

Davis was indebted to Sherman for printing; he refused to do more without a guaranty. Woods agreed to guarantee to Sherman the contract made by him with Davis to the amount of \$10,000. Afterwards, Davis paid money to Sherman, without directing any appropriation:

*Held*, that Sherman might apply it to the debt due before the guaranty: *Wood v. Sherman*, 71 Pa., 100.

#### ARBITRATION AND AWARD.

Where the subject-matter of certain suits pending was submitted to arbitration, the articles of submission, stipulating that a release should be executed by the plaintiffs in the suits, which should be delivered by the arbitrators on making their award, it was

*Held*, that an award against the party to whom the release was to be made was not binding upon him, there having been no release made and delivered, as was agreed upon: *Burt v. McFadden et al.*, 58 Ill., 479.

#### ASSIGNOR AND ASSIGNEE.

1. The negligence of an assignee in the prosecution of a suit, whereby interest on the prior debts was accumulated, and the property deteriorated, bars him or his ad-

ministrator from any recovery against the estate of the assignor: *Wilson's Adm'r v. Barclay's Ex'r et al.*, 22 Grattan, 534.

2. Negligence in enforcing a deed of trust on personal property, given to the assignor to secure the debt, by which it was allowed to be lost to the trust, bars the assignee's recovery against the estate of the assignor: *Ib.*

3. The rule of an insurance company required that notice of the transfer of a policy should be given to the company; in an action by a transferee, who had not given notice to recover for loss by fire, evidence that the company had "always permitted and do now permit such transfers to be made:"

*Held*, to be inadmissible: *Burger v. Farmers' Mutual Insurance Company*, 71 Pa., 422.

4. A policy in a *mutual* insurance company was assignable by its terms; its charter provided in case of alienation of the property insured, the policy to be void:

*Held*, that an alienee of the property to whom the policy had been assigned, could not recover on the ground of want of knowledge of the provision: *Ib.*

#### ATTACHMENT.

1. An insurance company executed to Trask a marine policy on a ship, "for account of whom it may concern, loss if any, payable to assured or order;" no assignment of the policy to be valid unless the consent of the insurers be first obtained. He mortgaged the ship to Bell and covenanted to keep her insured, assigned the policy in blank and delivered it to Bell as collateral; a partial loss having occurred:

*Held*, that Bell was entitled to recover from the insurers in preference to a subsequently attaching creditor of Trask: *Insurance Company of Pennsylvania v. Phoenix Insurance Company*, 71 Pa., 31.

2. The transaction was an equitable transfer of the right to receive the money, not an assignment of the policy: *Ib.*

3. The relation of insurer and insured is one of confidence; a stranger can not become a party to the agreement without the insurer's consent: *Ib.*

4. The premium note was not paid by Trask, and after the loss the insurer settled with Bell; the amount of the note being allowed to be set-off, the condition against assignment which was for the insurer's benefit was thus waived: *Ib.*

#### BANKRUPTCY.

1. A discharged bankrupt is under a moral obligation to pay his debts in full when he can, and this obligation is, at common law, a sufficient consideration to sustain an actual parol promise to do so: *Apperson & Co. v. Stewart*, 27 Ark., 619.

2. An unwritten promise to revive a discharged debt must be distinct, specific and satisfactorily proven, and, if conditional, the party seeking to enforce it must show that the condition has been satisfied: *Ib.*

3. The bankrupt act of March 2, 1867, vests exclusively in the Federal courts the power to contest the validity of a bankrupt's discharge, on the ground that it was fraudulently obtained. This can not be done, in the first instance in the State courts: *Oates, Adm'r, v. Parish et al.*, 47 Ala., 157.

#### BANKS AND BANKING.

1. The right of alienation is an incident of property, and a by-law of a bank prohibiting the alienation of stock therein, or putting restrictions thereon, is void, as being in restraint of trade: *Moore v. Bank of Commerce*, 52 Mo., 377.

2. An officer of a bank informed a party applying to the bank, that he might safely loan money on a pledge of their stock to the owner of it, taking the stock as pledge:

*Held*, that the bank was, after the loan was made, estopped to forfeit the stock for alleged dues: *Ib.*

**BILLS AND NOTES.**

1. An indorsement of partial payment, made on a note by the holder without the privity of the maker, is not of itself sufficient evidence of a payment to repel a defense created by the Statute of Limitations; but such indorsement made by the consent of the maker is sufficient: *Phillips v. Mahan*, 52 Mo., 197.

2. A promissory note whereof the consideration is an agreement to procure a responsible party and have him appointed administrator of an estate, is void as against public policy: *Porter v. Jones*, *Ib.*, 399.

3. An indorsee of negotiable paper before maturity is presumed to be the owner in good faith and for value, unless there are circumstances antecedent to, or attendant on, the act of transfer, amounting to either actual notice to the holder, of fraud, illegality or failure of consideration, or to such a combination of suspicious circumstances, as would in legal contemplation afford ground for the presumption that the purchaser of the paper was aware, at the time of its acquisition of some equity between the original parties thereto, which should have prevented its purchase by him: *Horton v. Bayne* *Ib.*, 531.

4. A. B. & C., while partners, indorsed certain promissory notes. A. died before the notes matured. At the maturity of the notes part of the amount was paid by the maker, and renewal notes were given for the remainder which were indorsed by B. & C. with the former firm name, and the original notes were surrendered up to the makers and destroyed. The original notes were not protested, nor were any steps taken to hold A.'s estate upon them:

*Held*, that A.'s estate would not be held liable for the amount unpaid on the original notes nor on the renewal notes; and it makes no difference that the holder of the notes had an understanding with B. & C. that the renewal notes were not taken in satisfaction of the original debt: *Central Savings Bank v. Mead*, *Adm'r*, *Ib.*, 546.

5. Any material alteration of a note or bill, after delivery, without the consent of the maker, either as to time of payment or amount, whether such alteration be favorable to the maker or not, renders the note or bill void, and a plea by the maker setting up such defense, when the alteration appears upon the face of the note or bill, devolves the burden of proof upon the payee or holder to show that the alteration was made before the delivery, or afterward by consent of the maker; otherwise the alteration does not appear upon the face of the note or bill: *Chism et al. v. Towner*, 27 Ark., 108.

6. M. in March, 1863, having purchased property of R., gave him in payment an order payable in Confederate currency on C., who was M.'s debtor; C. took up the order, giving therefor his promissory note to R.:

*Held*, that the note was neither illegal, nor without consideration: *Jordan v. Cobb*, 47 Ala., 132.

**BILL OF EXCEPTIONS.**

1. A motion to strike out part of a pleading can only be made a part of the record by being embodied in a bill of exceptions: *The G. M. & H. Turnpike Co. v. Scher et al.*, 40 Indiana, 424.

2. If a bill of exceptions shows that such motion was filed, and points out a place for its insertion by the words [here insert], this will authorize the clerk to insert the motion in the bill: *Ib.*

3. Such motion can not be made a part of the record by the clerk's filling the blank in the bill of exceptions, with a reference to a page of the transcript where it may be found. The motion must be copied into the bill of exceptions, signed by

the Judge, and certified by the clerk to be a full, true and complete copy of the original on file in his office: *Ib.*

4. The bill of exceptions must show what ruling was made upon the motion, and whether exception was taken to the ruling. Recitals of the clerk upon these points can not be regarded: *Ib.*

#### BONDS.

1. Twelve months after date I bind myself, etc., to pay C. twenty-five hundred dollars, in currency, at its specie value, with interest from date, June 23, 1865. Two Judges hold the word "dollars" to mean specie dollars; two that it is a contract to pay currency at its specie value; and one that it is a contract to pay currency at its specie value at the time of payment: *Culdwell v. Craig*, 22 Grattan, 340.

2. V. executes to C. a bond for the purchase of property, dated March 30, 1864, to be paid with interest, three years from the date, in the currency used in the common business of the country at the date of maturity. Parol evidence is admissible to show what was the true understanding of the parties in respect to the kind of currency in which the same was to be performed, or with reference to which, as a standard of value, it was made and entered into: *Culbreath v. Porcelain and Earthenware Co.*, *Ib.*, 697.

#### BRIDGE.

1. Viewers reported in favor of a bridge, suggesting that a turnpike company should pay one-third the cost; the company agreed to do so; the report was confirmed and the bridge erected by the county at a cost of \$16,500; inspectors reported the bridge well erected, etc., but valued at \$11,000; the Court of Quarter Sessions disapproved the report:

*Held*, that the company could not take advantage of that proceeding which was *res inter alios acta*, but were bound for one-third of the *bona fide* cost of the bridge: *New Holland Turnpike v. Lancaster Co.*, 71 Pa., 442.

2. The company entered into a bond in the penalty of \$4,000 to pay one-third of all reasonable and proper expenses in building the bridge:

*Held*, that the county in covenant could recover one-third of the expenses, although beyond the penalty of the bond: *Ib.*

3. The obligee in such bond may elect to proceed in debt for the penalty, but then can not go on the covenant; or on the covenant, when he may recover as often as an injury arises: *Ib.*

#### BROKERS.

1. A. wishing to borrow money on some property, applied to B., who agreed to find a lender, and to have the title examined, and would charge \$200, which would include the expenses of examining the title and his commission. A. gave B. his title deed at the time; a defect being found in the title, the lender refused to loan the money, and B. sued A. for the \$200:

*Held*, that B. should have first examined the title before applying for a loan, and was A.'s agent for that purpose, as well as for procuring a loan, and was not entitled to his commission: *Budd et al. v. Zoller*, 52 Mo., 238.

2. A broker employed to effect a loan is entitled to his commission, when he has found a lender, who has the money and who approves of the security, unless his rights are varied by special contract. There is always an implied condition that the borrower will show a good title: *Ib.* Per Ewing & Wagner, Judges, dissenting.

### BUILDING FUND ASSOCIATION.

W., a shareholder in a building fund association, having obtained an advance of money on his shares, the association thereby acquired the right of property therein; and the assignment of the shares to the association for the advance he received was not a hypothecation for a loan, but an absolute surrender of them to the association, whereby they were sunk and extinguished, and can not entitle the said W. to participate in the final division and distribution of the funds of the association: *White v. Mich. Building Fund Association*, 22 Grattan, 233.

### CARRIERS.

1. When a railroad company, in the unrestrained exercise of its franchises, consents to the delivery of freight in its care, or warehouse for immediate shipment upon such delivery, the liability of the company as a common carrier at once attaches, and it is held responsible for any loss growing out of any neglect of the duties incident thereto: *Illinois Central Railroad Co. v. Ashmead*, 58 Ill., 487.

2. And even where it is not in the free exercise of its franchises and receives property for transportation, and gives the ordinary shipping receipt, without limiting its liability or undertaking, it would still be liable, notwithstanding military or other control. In such a case, it must be presumed the company knew whether it could nevertheless act as a common carrier, and on what terms; also, whether it had the necessary permission or orders for the purpose from the military authorities, or other controlling power. It is held in such case to a performance of the duty according to the terms on which it was undertaken: *Ib.*

3. A common carrier by a special contract can limit his common law liability, but can not exempt himself from the consequences of his own negligence: *Ketchum v. The American Merchants' Union Express Co.*, 52 Mo., 390.

### CHANCERY.

1. Mrs. L. joined her husband in a promissory note for her husband's debt for \$2,000, and also in a mortgage on her lands of her separate estate, derived from the land of her father since the passage of the Code, to secure the payment of said note to E. K. & Co.; afterward Mrs. L. and her husband sold said lands to R. for \$6,000, and R. was to pay the \$2,000 mortgage debt; R. then sold the same lands to B., and B. also undertook the payment of said mortgage debt to E. K. & Co. But R. and B. failed to pay said mortgage debt, and thereupon the surviving partner of E. K. & Co. filed his bill against Mrs. L. and her husband to foreclose the mortgage and collect the mortgage debt. In this suit he failed, and the mortgage and note were held to be void as to Mrs. L.:

*Held*, that after the defeat of the mortgage the \$2,000 (the amount of the mortgage debt) left in R.'s hands to pay this debt, was the separate property of Mrs. L., which was secured to her by a vendor's lien in her favor on said land, and she could file a bill in chancery by her next friend against her husband and B., who was in the possession of said land under R.'s deed, to enforce her lien for said \$2,000 so left in the hands of R.: *Bunkley et al. v. Lynch*, 47 Ala., 210.

2. An administrator in North Carolina, on his final settlement, was charged with, and accounted for, a note given him as administrator at a sale of the property of an intestate in Alabama. The maker of the note died intestate in this State, and his children, without administration, took possession of the estate and converted it to their own use:

*Held*, that the estate became a fund in the hands of the children for the payment of the note, and there being no adequate remedy at law, the administrator could file

a bill in his own name to subject the estate to the payment of the note: *Dunlap v. Newman, Ib.*, 429.

3. Real estate purchased by a partnership for partnership purposes and paid for with partnership funds, as to the creditors of the firm is in equity treated as personal property, and will, if necessary, be subjected to the payment of their debts, whether the title be conveyed to the partners by name or to one of them, or to other persons: *Offert et al. v. Scott, Ib.*, 104.

4. A Court of Chancery will correct a mistake in a conveyance, but will not, under the pretext of correcting a mistake, make that a conveyance which is not in itself a conveyance. A Court of Chancery can not give life to an instrument which has no vitality in itself: *Lindley v. Smith et al.*, 58 Ill., 250.

5. A donation of land for the site of a school-house is a donation to a charitable use, and in such a case a Court of Equity will supply all defects of conveyance: *Price v. School Directors, Ib.*, 452.

6. Where the purchaser at a sale under a decree in chancery refuses to complete his purchase, in order to charge him with any deficiency arising on a re-sale, the Master should report the sale and refusal, and after confirmation of the report a motion should be made, and notice thereof served upon the purchaser, that he be ordered to complete his purchase by a certain specified time, or in default thereof the property be re-sold at his risk: *Hill et al. v. Hill, Ib.*, 239.

7. And in such case, on failure to pay the purchase money, or show cause therefor, the order of re-sale should direct the property to be re-sold at such delinquent bidder's risk and expense: *Ib.*

8. In some instances where the purchaser is a party to the suit, and entitled to share in the proceeds arising from the sale, the court will reserve the question, by whom the costs and expenses of the re-sale and the deficiency are to be borne: *Ib.*

#### CHARGE ON LAND.

Where land is sold subject to purchase money and interest due a third person, it is a covenant by the vendee to pay such purchase money; it need not appear affirmatively that such incumbrance was payable out of the purchase money: *Metzger's Appeal*, 71 Pa., 330.

#### CHECKS ON BANKS.

If the holder of a check is not able to present it by reason of the removal of the bank and the condition of the country, he should give notice of the fact to the drawer, and offer to return it. And if he fails to do so, the drawer is not liable: *Purcell v. Allemon & Son*, 22 Grattan, 739.

#### CITY.

1. It is not a negligent or wrongful act for a city to silently allow the owner of property abutting on a street to properly construct a coal vault under the sidewalk: *City of LaFayette v. Blood*, 40 Ind., 62.

2. The city is not chargeable with negligence where the occupant of the premises using such vault leaves the opening of said vault in the sidewalk uncovered for a short time, while engaged in putting coal into the vault, and where the city officials have no notice that it is uncovered: *Ib.*

#### CONCURRENT CONTRACT.

*Ex vi termini* a guaranty of a contract is a concurrent act and part of the original agreement: *Woods v. Sherman*, 71 Pa., 100.

#### CONDITIONAL ESTATE.

A condition in a conveyance may be enforced by ejectment, but a consideration, although a covenant, can not: *Soper v. Guernsey*, 71 Pa., 219.

### CONDITIONAL SALES.

On a conditional sale, the relationship of debtor and creditor does not exist between the parties—the property in the thing sold passes to the vendee, subject to be divested on performance of the condition as stipulated, and if the vendee part with the property before the time to redeem expires, the vendor's only remedy is by an action for damages for breach of the covenant, and not for the recovery of the property: *Carnal v. Clark ex use*, 27 Ark., 500.

### CONFEDERATE COURTS.

All acts and proceedings of the different Courts of the State, done and had under authority of the Convention of 1861, or while the State was in rebellion, are void: *Carr et al. v. The State ex use*, 27 Ark., 444.

### CONFLICT OF LAWS.

1. An exemplification of the record of the State of New York was certified by the Clerk, and J. W. G., "Justice of the Supreme Court;" it appeared that there were other judges of the same court. J. W. G. did not appear to be Chief Justice:

*Held*, not to be properly authenticated: *Van Sturch v. Griffin*, 71 Pa., 240.

2. The decree in New York was that respondent should not marry again during the life of libellant; the decree as to this had no extra-territorial effect: *Ib.*

3. The plaintiff having been divorced on her own libel in Pennsylvania, it was lawful for her to marry again, and her marriage would be treated as valid everywhere: *Ib.*

4. A marriage contracted and celebrated in the State of South Carolina, between a man, a citizen of this State, domiciled in this State, with a woman a citizen of the former State, and residing there, with the intention of coming immediately to this State to reside at the husband's domicile here, will be treated in our courts as a marriage contracted in this State, for the purpose of regulating the marital rights of both parties; and the marital rights of the wife will be regulated by the laws of the husband's domicile if there is no marriage contract: *Glenn v. Glenn*, 47 Ala., 204.

### CONSIDERATION.

Where a party sought to recover back money voluntarily paid upon a special assessment, made for the construction of a certain public improvement adjacent to his premises, on the ground that the consideration for the payment had wholly failed, it was considered, the improvement having been made, the plaintiff had received a full equivalent or compensation for the money paid, in the enhanced value which his property had derived from the improvement: *Falls v. City of Cairo*, 55 Ill., 403.

### CONSTITUTIONAL LAW.

1. The Act of March 30, 1871, entitled an act to provide for the funding and payment of the public debt, provides that the coupons attached to the bonds to be issued under that act, "shall be payable semi-annually, and be receivable at maturity, for all taxes, debts, dues, and demands, due the State; which shall be expressed on their face." The Act constitutes a contract on the part of the State, which can not be repealed by the General Assembly; and the contract follows the coupons in the hands of the holders thereof, though purchased after an act repealing the said act: *Antoni v. Wright, Sheriff; Wright, Sheriff, v. Smith*, 22 Grattan, 833.

2. By section 40, of article 3, of the Constitution of the State, which declares that "the General Assembly shall enact no law authorizing private property to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such com-

pensation," the Legislature is absolutely prohibited by implication from taking private property for any private use whatever, without the consent of the owner: *New Central Coal Co. et al. v. George's Creek Coal and Iron Co.*, 37 Md., 537.

#### CONSTRUCTION OF STATUTES.

In the construction of a statute, where the Court finds, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the same statute, if upon a review of the whole act, the real intention of the Legislature can be collected from the larger and more extensive expressions used in other parts, effect will be given to the larger expressions: *State v. Jennings*, 57 Ark., 419.

#### CONTRACTS AND AGREEMENTS.

1. If the obligee does anything to obstruct or prevent the obligor from performing his part of the contract, the obligor is discharged from his obligation to perform it; the contract, in legal effect, is, on his part, performed, and he may demand performance at the hands of the other party: *Lewis and Wife v. Boskins, ad.*, 27, Ark., 61.

2. Where the parties have fixed the consideration, and stated it in the contract as a part of the agreement, this precludes an enquiry into the question of a failure of consideration, unless there is fraud, misrepresentation or deceit: *Gaines et al. v. Shelton*, 47 Ala., 414.

3. A., who was a retail dealer, contracted with B., a wholesale dealer, for a lot of clothing, to be shipped to A., part of which consisted of suits of clothing of a particular kind, quality and price. Part of the goods shipped by B. were not of the kind, quality, and price contracted for. A. refused to accept any portion of the goods, and immediately returned them to B.:

*Held*, that the contract of A. was an entire contract for the whole bill of goods, and he was not obliged to accept a part without the whole: *Smith v. Lewis*, 40 Ind., 98.

4. In January, 1867, A. owned certain land, and a building thereon, and at the date sold the same to the trustees of a church, reserving, by an instrument in writing, the use and possession of the building until March 1st, 1867. Before the first of March the trustees sold the building to B., and contemporaneously therewith A., as principal, with C., (one of the trustees of the church) as his surety, made a contract in writing with B., whereby A. and C. agreed to deliver to B. the building in as good condition as it then was, at such time as A. and C. might choose before the first of March, 1867. After the sale and before the first of March, the building was destroyed by fire. B. sued A. and C. on their agreement, for the value of the building, alleging a failure to deliver in as good condition:

*Held*, that there was a sufficient consideration to support the agreement; that the terms of the contract rendered A. and C. liable for the non-delivery of the building, although it was destroyed by fire without their fault: *Goddard v. Bebout et al.*, *Ib.*, 114.

5. A. being indebted to B. on certain notes secured by a mortgage of real estate, sold the real estate to C., and C., in consideration of the sale and conveyance of the real estate, promised to pay B. the amount due him from A.:

*Held*, that the conveyance of the real estate was a sufficient consideration to support the promise of C., and that his agreement was not within the statute of frauds:

*Held*, also, that the contract between A. and C. being for the benefit of B., he could avail himself thereof by suing C. thereon: *Helms et al., exr's, v. Kearns*, *Ib.*, 124.

6. Where by the agreement of three parties, any balance found due upon settlement between two of the parties is to be credited upon a note executed by two of the parties, one as principal and the other as surety, to the third party as payee, such

balance on being found has the force and effect of a payment. The contract being between three it can not be annulled by two of the contracting parties. The balance being struck and the credit entered, the agreement becomes executed. Any dispute between the maker and surety on the note as to the proper amount of the credit, does not affect the payee of the note: *Vawter v. Griffin et al.*, *Ib.*, 593.

7. Coulter executed this paper: "Due on demand, etc., to Bayard or order, 100 shares S. N. Stock," on which Ashton endorsed: "I hereby become security of Coulter for the fulfillment of the within obligation:"

Held, to be an original undertaking by Ashton, and Bayard might recover without proving diligence to pursue Coulter: *Ashton v. Bayard*, 71 Pa., 139.

8. Contracts with nurses, housekeepers, etc., sought to be enforced after the death of the person to whom the services were rendered, ought to be very closely scanned, and juries instructed that they could be made out only by very clear proof: *Thompson v. Stevens*, *Ib.*, 161.

9. Such contract must possess the element of certainty: *Ib.*

10. The promise to the plaintiff was, "if she would stay with him as long as he lived, he would provide and give her full and plenty after he was gone, so that she need not work;" this was sufficiently certain and definite; the measure of amount would be what would keep her without work, taking into consideration her condition in life: *Ib.*

11. Where services are gratuitously rendered under expectation of a legacy, there can be no contract and therefore no recovery for the services: *Ib.*

12. Where one does services on request, no matter what his expectations were, there may be a recovery for them: *Ib.*

13. Where by the terms of a written contract for furnishing the materials and laying the brick and stone-work for a building, it was provided that payment therefor should only be made upon the estimate and certificate of the superintendant of the work, in such case the obtaining of such certificate is a condition precedent to the payment of the money, and an action to recover therefore without first obtaining it, is prematurely brought: *Packard et al. v. Van Sholik*, 58 Ill., 79.

14. The sureties on a general freight agent's bond are not liable for a deficit in his accounts, arising from the default of his subordinates, under a general clause in the bond, that "such agent shall well and truly perform and execute the duties of freight agent, and shall render a just and true account of all moneys, goods and chattels, which shall come into his charge or possession," where the subordinates are appointed by the railroad company, although appointed with the approbation and consent of the general agent, and acting under his direction and control: *Chicago and Alton Railroad Co. v. Higgins et al.*, *Ib.*, 128.

#### CONVERSION.

Where defendant converts property of plaintiff to his own use, and plaintiff assigns the tort and elects to sue on an implied promise, he can only recover the amount actually received by the defendant: *Howel v. Graves et al.*, 27 Ark., 365.

#### CONVEYANCE.

1. A conveyance of real estate in fee to husband and wife creates a tenancy by the entirety with the right of survivorship: *Garner v. Jones*, 52 Mo., 68.

2. If a grantor, with or without any previous arrangement with the grantee sign, seal and acknowledge a deed, place it in the hands of the register to be recorded, notify the grantee of the act and he assent to receive it, by words only, this would be a good delivery, though the grantee die before taking it into his actual possession,

because the assent is the principal element, and taking the deed into possession is not indispensable but only evidence of assent and acceptance: *Kingsbury v. Burnside et al.*, 58 Ill., 310.

3. A deed signed, sealed and acknowledged, without the knowledge or assent of the grantee, was sent by the grantor to a third person at the place where the land was situate, such third person being a stranger to the transaction, not authorized by the grantee to receive the deed, but with the simple direction from the grantor to have it recorded. There was no declaration that it was delivered for the grantee's use, nor was it delivered as an escrow:

*Held*, the person to whom the deed was thus sent was a mere medium through whom it was to pass to the hands of the recorder; the act did not constitute a delivery, in the legal sense: *Ib.*

4. The mere act of recording a deed under such circumstances would not amount to a delivery: *Ib.*

5. And during the time intervening the placing of the deed in the hands of the register to be recorded and the giving of his assent by the grantee, the deed will remain wholly inoperative for any purpose, and might during that time, be reclaimed by the grantor and cancelled, with no other effect than that, perhaps, of casting a cloud upon his title, by its being recorded. A deed takes effect only in its delivery, with a few exceptions, where the necessities of the case require the application of the doctrine of relation, and there could be no delivery until the grantee gave his assent: *Ib.*

6. A party who held the legal title to a tract of land, but upon a secret parol trust for his wife, executed a deed therefor, in which his wife also joined, to the brother of the latter, and placed the same in the hands of the proper officer to be recorded, the grantee having no knowledge of the act until some time afterward, when, upon meeting the grantee, the grantor said to him: "By the way, the property of your sister has been deeded to you, and I want you to look after her interests, and see that she has her property." To which the grantee replied: "That was all right," or "very well," or words to that effect:

*Held*, this constituted an acceptance of the deed by the grantee: *Ib.*

7. Conveyances by married women for the transfer of their real estate or dower interest, do not take effect by delivery, as other deeds, but only by being acknowledged in the statutory mode. An acknowledgment, not in the mode prescribed must render the deed useless as a conveyance of title: *Ib.*

#### CORPORATIONS.

1. In a suit by a corporation on a promissory note, given to it in its corporate capacity by defendant, it is not ground of demurrer that the plaintiff failed to allege that it was, at the date of the note, a corporation, etc. Defendant having entered into the contract with the company in its corporate name, thereby admitting it to be duly constituted a body politic and corporate: *Farmers' and Merchants' Insurance Company v. Needles*, 52 Mo., 17.

2. Where there is no provision made in the law under which a corporation is organized, or in a by-law of the corporation, or in a contract of the corporation, by which compensation is to be made to the directors for services, compensation can not be recovered; and in the absence of such provision, the making of an allowance by the board of directors to themselves and the issuing of an order or bond, as a compensation for past services, are invalid: *The Maux Ferry Gravel Road Co. v. Brown*, 40 Ind., 361.

3. Corporations are citizens within the meaning of the clause of the Constitution

of the United States, which extends the judicial power of the Courts of the United States to controversies between the citizens of different States; and they are citizens only of the State or sovereignty that created them: *The West. Un. Tel. Co. v. Dickinson*, 40 Ind., 444.

4. Corporations having municipal powers are mere tenants at will of the Legislature, so far as the officers thereof are concerned, and the General Assembly may incorporate a place, add to, qualify or abolish the municipal powers without its consent: *State v. Jennings*, 27 Ark., 419.

5. A right of action against municipal corporations does not exist at common law, and their liability to a private action for torts must be determined by the statute which creates them: *City of Little Rock v. Willis*, *Ib.*, 572.

6. The sections of the general incorporation act, conferring upon cities the "power to lay off, open, widen, straighten and establish, keep in order, and repair all streets, alleys, and public grounds, etc., and to open and construct and keep in repair sewers and drains," are not mandatory, and for the exercise of a lawful power, which by law, is vested in the judgment and discretion of a municipal corporation or public body, for the good of the whole, no injury for which an action will lie can be committed; but for the imperfect, negligent, unskillful execution of a thing ordained to be done, an action will lie in the absence of an express statute: *Ib.*

7. Directors in a stock corporation, as to the stockholders, are not technical trustees, but are as mandatories, and are bound to apply no more than ordinary skill and diligence: *Spring's Appeal*, 71 Pa., 11.

8. Directors are not liable for mistakes of judgment although so gross as to appear absurd, if honest and within the scope of their powers; especially where acting under the direction of legal counsel: *Ib.*

9. A provision in an act of incorporation inconsistent with the individual irresponsibility of the members is in derogation of the common law, and to be strictly construed: *Moyer v. Slate Co.*, *Ib.*, 293.

10. It seems, the management and transaction of all business for which a corporation is created, and its general affairs, are within the usual powers of the board of directors, but a power given to a corporation to increase its capital stock, can not be exercised by the directors, except they be specially authorized so to do, either by the charter or by the share-holders: *Eidman et al. v. Bowman et al.*, 58 Ill., 444.

11. If the capital stock of a bank, or other corporation, be increased, by proper authority, the right to such additional stock vests in the original stockholders, each one to take in proportion to the amount held by him of the original stock, if he will pay for it. This right may be waived, but if it is not, the party entitled can not be deprived of it by the board of directors of the corporation, or otherwise: *Ib.*

12. Between private citizens and counties, in incorporated towns or cities of the State, there is a wide and substantial distinction with respect to vested rights protected from legislative power. Such public bodies are public corporations created by the legislature for political purposes, with political powers to be exercised for purposes connected with the public good in the administration of civil government. They are instruments of government subject at all times to the control of the legislature, with respect to their duration, powers, rights and property. It is of the essence of such a corporation that the government has the sole right, as trustee of the public interest, at its own good will and pleasure, to inspect, regulate, control, and direct the corporation, its funds and franchises: *Mayor, etc., of Hagerstown v. Sehner*, 37 Md., 180.

13. The fact of the selling of the franchises of a mining company by the corporators, for a consideration, before any of the stock was subscribed for, by means of

which alone corporate rights could be transferred, forms no ground for an injunction against the corporation to stay it in the exercise of its franchises. If there be a mis-user or abuser of the franchises granted to a corporation, the State alone can take advantage of such acts, and that by a direct proceeding for the purpose. No cause of forfeiture can be taken advantage of, or enforced against a corporation, collaterally or incidentally, or in any other mode, than by direct proceeding, instituted by the State for that purpose: *New Central Coal Co. et al. v. George's Creek Coal and Iron Co.*, 37 Md., 537.

#### COSTS.

A defendant was fined for the violation of a city ordinance, and appealed to the Circuit Court, where he was acquitted. Is the city subject to a judgment for costs in such a case? *Mayor, etc., of Mobile, v. Burton*, 47 Ala., 84.

#### COURTS.

1. The holding of a court at a time or place, other than that prescribed or authorized by law, and all proceedings thereunder, are *coram non judice* and void: *Jones ex parte*, 27 Ark., 349.

2. The findings upon the facts by the court sitting as a jury, required by law to be reduced to writing, need not necessarily be put in writing before judgment, but the court may, after judgment rendered, reduce the same to writing: *Apperson & Co. v. Stewart, Ib.*, 619.

#### COVENANTS.

1. A covenant is said to run with the land, when either the liability for its performance or the right to enforce it passes to the assignee of the land itself; and to run with the reversion, when the liability to perform it, or the right to enforce it, passes to the assignee of the reversion: *Dorsey v. St. Louis, Alton & Terre Haute Railroad Company*, 58 Ill., 65.

2. If two parties enter into an indenture or agreement intended to be signed and sealed by both, but it is signed and sealed only by one, it will be the covenant of him who signed and sealed it; and the only exception to the rule occurs in cases of indenture of lease, and in respect to those covenants of the lessee which are annexed to the term, or depend on the interest therein, and which do not bind the lessee unless the lessor has also executed the indenture: *Western Md. Railroad Company v. Patterson*, 37 Md., 328.

#### CRIMINAL LAW.

1. Where the defendant has not introduced proof of his general character on the trial, the court may properly refuse to permit the defendant's counsel to comment, in argument, upon such character: *Cluck v. The State*, 40 Ind., 263.

2. It is not a sufficient ground for challenge of a juror that he formed some opinion as to the guilt or innocence of the accused, about the time of the homicide, from reading the newspapers, if the juror state that he has now no opinion as to the guilt or innocence of the defendant, and has forgotten the circumstances of the case, and that any opinion formed would readily yield to the evidence and the law: *Ib.*

3. On a trial for murder, no proof of intoxication at the time of the crime, which falls short of showing the defendant to have been utterly incapable of acting from motive, will shield him from conviction. If the reason be perverted, or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable: *Ib.*

4. When on the trial of an indictment for murder the court had instructed the jury,

that if the deceased "died from a disease not brought on by a blow given by the defendant, you must acquit; no matter what violence the defendant may have inflicted upon the deceased, if it did not mediate or immediately accelerate her death, there can be no conviction;" it was not error to refuse to also "instruct," that if they believe the wounds inflicted on the deceased were not dangerous and would not have given her any trouble at all, but that by subsequent exposure to the rain, and by reason of her intemperate habits, she brought on erysipelas, which caused her death, the jury should acquit the defendant, without regard to the nature or character of the instrument with which the wound was inflicted: *Harvey v. The State, Ib.*, 516.

5. The accused in a criminal case is entitled to have the charges moved for by him in writing given in the very terms of the written charges, if such charges are not abstract and are proper enunciations of the law applicable to the case. It is error to refuse such charges, though charges similar in principle have already been given. The rule of error without injury, does not apply in such a case. The right is absolute, and must be enforced: *Williams v. The State*, 47 Ala., 659.

6. When asked by the accused to give a charge upon the form of the verdict, if there is any doubt as to the guilt or grade of guilt, the court should not say, in the hearing of the jury. "I can't conceive how the jury could find such a verdict upon such a state of facts; but if you request it, I'll instruct them." Such remarks may be fatal to fairness: *Stephens v. The State, Ib.*, 696.

#### CUSTOM.

A person is not bound by a custom unless he has personal knowledge thereof, or it is so notorious, universal and well established that his knowledge thereof would be conclusively presumed: *Walsh v. Mississippi Valley Transportation Company*, 52 Mo. 434.

#### DAMAGES.

In an action for damages for personal injuries the rule is, that although the plaintiff may have failed to exercise ordinary care and diligence, and such failure contributed in a remote degree to the injury, yet, if defendant was guilty of negligence, which was the immediate cause of the injury, and with the exercise of ordinary prudence and care by defendant the injury could have been prevented, defendant is liable. But if plaintiff could have avoided the injury by the exercise of ordinary care and prudence, defendant is not liable. And this principle is not confined to any particular class or classes of persons: *Walsh v. Mississippi Valley Transportation Company*, 52 Mo., 434.

#### DECREES.

1. A bill is filed by S. a committee of two idiots, for the sale of their land, and there is a decree for a sale, and a sale; and the report of the marshal of the court shows that the land was purchased by S., the committee. This report is confirmed, and the marshal is directed to convey the land to S., which is done. S. afterwards sells the land to C., who sues to recover the land. Though the decree confirming the sale to S. was erroneous and S. is forbid by the statute to purchase or own the land during the incompetency of the idiots, yet the decree is not void, but voidable, and can not be impeached collaterally, and until it is reversed must be held to be valid, and as passing a good title to S.: *Cline's heirs v. Catron*, 22 Grattan, 378.

2. Though a decree denies to the plaintiffs the specific execution of the contract they seek to enforce, yet if it authorizes them to amend their bill, if they so elect, and ask for other relief and continues the cause to give them time to amend their bill, it is not a final decree: *Ambrose's heirs v. Keeler, Ib.*, 769.

## DEEDS.

The mere surrender or re-delivery of a deed by the grantee to the grantor, does not work a divestiture of the title out of the grantee; nor can a trustee, having accepted a conveyance on a secret trust, repudiate the trust and divest himself of the title conveyed to him by surrendering the deeds to the grantor, and declaring he will not have anything more to do with the matter: *Kimball v. Gray*, 47 Ala., 230.

## DESCENTS.

Where the heir of an intestate has received property from such intestate, in his lifetime, and by an instrument in writing, whether under seal or not, acknowledged the receipt thereof as his full share of the estate, the property so received, not having been charged to him, and the transaction being untainted with fraud, must be held to be in full payment and satisfaction of his share of the estate, by express agreement *Bishop et al. v. Davenport et al.*, 58 Ill., 105.

## DIVORCE.

A wife having left her husband without good legal grounds, and taken their child with her, though there is no other imputation upon her conduct, upon a decree for a divorce *a mensa et thoro* at the suit of the husband, on the ground of desertion, the child will be restored to the husband, though it is a female, and but three years old; and though the husband's treatment of his wife has been coarse, rude, petulant, close, exacting, and penurious, leaving her to bear alone burdens and trials which it should have been his highest pleasure to share and relieve: *Carr v. Carr*, 22 Grattan, 168.

## DOWER.

The fact that a married woman was made a party to the record in a suit for the partition of lands of her former husband and for the assignment of her dower therein will not estop her from afterward denying and contesting the validity of those proceedings: *Crenshaw v. Creek-et al.*, 52 Mo., 98.

## ECCLESIASTICAL COURTS.

1. The civil courts will interfere with churches and religious associations when rights of property or civil rights are involved, but will not revise the decisions of such associations upon ecclesiastical matters merely to ascertain their jurisdiction. The decisions of ecclesiastical courts are final as to what constitutes an offense against the discipline of the church: *Chase et al. v. Cheney*, 58 Ill., 509.

2. Mr. Chief Justice Lawrence and Mr. Justice Sheldon dissent from the view that, in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary, as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws or canons of the religious association to which it belongs, and its decision of that question is binding upon secular courts, and hold that such courts should examine the question of jurisdiction, without regard to the decision of the spiritual court itself, and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give: *Ib.*

## ELECTION.

1. Resident means one who has a permanent abode; it does not include one sojourning temporarily, or for some special purpose: *Fry's case*, 71 Pa., 302.

2. Removal, without intention permanently to reside elsewhere, will not lose residence, nor will intention to remove permanently, not followed by actual removal, acquire it: *Ib.*

3. The question of residence and authorities extensively examined and discussed in this case: *Ib.*

#### EMINENT DOMAIN.

The Legislature, in virtue of the right of eminent domain, may authorize the condemnation of private property by a mining company for the construction of a railroad to be used for the transportation of coal from its mines—such use being of a public nature: *New Central Coal Co. et al. v. George's Creek Coal and Iron Co.*, 37 Md., 537.

#### EQUITY.

1. Tax payers can file bills in equity to annul illegal acts of county courts, when such acts will increase the taxation, and the State is not a necessary party to such suits: *Mennoyer et al. v. Mo. & Miss. R. R. Co. et al.*, 52 Mo., 81.

2. A party not in possession can not go into equity to have a cloud removed from his title as against one in possession holding under a deed: *Clark v. Covenant M. Ins. Co. Ib.*, 272.

3. When the opposite party can only claim title through the record, and a defect appears upon the face of such record, there is no cloud on the title such as will call for the exercise of the equitable power of the court: *Ib.*

4. When the opposite party can claim title only through the record, and there is no defect apparent on the record, but such defect may be cured by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, there is a cloud on the title: *Ib.*

#### EQUITY JURISDICTION.

1. A. owned a steam saw-mill on the land of B. After assessment to A. for taxes, A. sold the mill to C., on bill by C. to enjoin the collection of the tax, on the ground that the mill was a fixture and assessed with the land:

*Hill*, that the mill was not a fixture, but if assessed with the land, and not as the personal property of A., the plaintiff's remedy for any injury he might suffer from the sale was in law and not by injunction: *Witherspoon & Gilliam v. Nickels, Sheriff*, 27 Ark., 332.

2. Equity jurisprudence, independent of a statute for that purpose, has no cognizance of a bill brought *in rem* against real estate to foreclose a mortgage given thereon: *State ex use v. Bailey, Ib.*, 473.

#### EQUITY PRACTICE.

On dismissal of bill for want of equity, where it appears that complainant has legal rights, the better practice is to dismiss without prejudice and not peremptorily: *Polpe & Jones v. Jackson, adm'r*, 27 Ark., 585.

#### ESTATES OF DECEDENTS.

An administrator, on whose petition real estate is sold under an order of the Probate Court, can not afterward move the court to set aside the sale for want of jurisdiction, although the estate is afterward declared insolvent, and he is continued in the office of administrator; the estoppel operates against the person, and not against his official capacity: *Snedecor et al. v. Mobley*, 47 Ala., 517.

#### EVIDENCE.

1. A request that leading questions may be asked a party's own witness, on the ground that he is hostile, is addressed to the discretion of the Judge: *Williams v. Allen, adm'r*, 40 Ind., 295.

2. It is not sufficient that the ground of objection to evidence offered be stated in the motion for a new trial. It must appear by the record to have been stated at the time the objection to the evidence was made, and when the evidence was introduced: *Harvey v. The State, Ib.*, 516.

3. Opinions of witnesses are admissible when the subject of inquiry is so indefinite and general in its nature as not to be susceptible of direct proof, or if the witness has had the means of personal observation, and the facts and circumstances upon which he bases his conclusions are incapable of being detailed so intelligibly as to enable any one but the observer himself to form an intelligent conclusion from them: *Eyerman v. Sheehan et al.*, 52 Mo., 221.

4. The party producing a witness may be asked to state what is to be proved by him, so that if the facts are irrelevant they may be excluded: *Morgan v. Broune*, 71 Pa., 130.

5. The party relying upon a tax deed as title must produce a valid judgment against the land for the land, and a precept under which the sale of the land was made before the deed, can be used in evidence: *Williams et al. v. Underhill*, 58 Ill., 137.

6. In case of a simple contract in writing, it is competent to prove by parol a distinct subsequent agreement, waiving, abandoning or modifying the terms of the writing, or an additional, suppletory agreement, supplying something which is not in the written contract: *Allen v. Sowerly*, 37 Md., 410.

#### EXECUTIONS.

1. Where land exposed for sale under an execution is bid off, but the money is not paid over, and the land is re-sold under the same execution, but for a less sum, if the amount finally paid is sufficient to satisfy the judgment and costs, the defendant in execution will be entitled to maintain a suit in equity for the difference in the bids: *Strawbridge v. Clark*, 52 Mo., 21.

2. A debtor's equitable estate in personal property can not at law be seized and sold under a *feri facias*: *Martin v. Jewell et al.*, 37 Md., 530.

#### EXECUTORS AND ADMINISTRATORS.

1. A clause of a will as follows, "I give to my friend, P. O. H., ten thousand dollars in notes or Confederate bonds, at the option of my executors hereinafter named," creates a general and not a specific legacy, which the option of the executors will not be permitted to defeat by a payment of the Confederate States bonds, which had become worthless, when there were general assets out of which the legacy could be paid, in whole or in part: *Hooper v. Bibb and Falkner Ex'rs*, 47 Ala. Rep., 547.

2. While an executor, as such, can not be held to an account and settlement before a foreign court, or the court of a different State from the one granting such letters, yet, on bill for that purpose, he may be held in such court to disclose with what, and the character of the funds with which he has purchased property, and whether he holds the same as trustee, and for what uses and trusts: *Clopton v. Booker et al.*, 27 Ark., 482.

3. An executor invested money of the estate in his own name, in stocks, at a low rate; this stock rose in price:

*Held*, that he was liable for the dividends received and the market value of the stock at the time of the decree: *Norris' Appeal*, 71 Pa., 106.

4. Investment of trust funds in a trustee's individual name, is concealment: *Ib.*

5. Imperfect information from a trustee as to funds invested in his name, if calculated to give a false impression, is concealment: *Ib.*

6. Where a trustee speculates with trust funds, he may be held to profit, if the investment has been successful; interest, if disastrous: *Ib.*

7. When trust funds can be traced into a particular investment, it belongs to the *cestui que trust* if he so elects: *Ib.*

8. An executor with funds of his own and of the estate purchased stocks; when the investment with trust funds could not be discriminated, the *cestui que trust* might select the most profitable investments as having been made for the estate: *Ib.*

9. Principles upon which commissions and costs are disallowed to a trustee discussed in this case: *Ib.*

#### FRAUD.

1. Where a party believes that a claim upon which an action has been commenced, has already been paid, but because he is afraid he can not prove the payment, and to avoid trouble and litigation, he pays a part of it, he can not recover back the amount so paid on the ground of fraud, based upon statements of the claimant that the debt had not been paid: *Bowman v. Caruthers*, 40 Ind., 90.

2. Representations to amount to fraud must be of a decided and reliable character, holding out inducements to make the contract, calculated to mislead the purchaser, and induce him to buy on the faith and confidence of such representations, and in the absence of means of information to be derived from his own observation and information, and from which he could draw conclusions to guide him in making the contract, independent of the representations of the vendor: *Grider and wife v. Clepton*, 27 Ark., 244.

#### FRAUDS—STATUTE OF.

An agreement by A. to pay B. for work to be done for C., is not a contract to answer for the default of another, and need not be in writing: *Sinclair v. Bradley*, 52 Mo., 180.

#### FORMER DECISIONS.

A wager between citizens of this State as to the result of a presidential election in another State, made prior to the election, is against public policy, and void. Courts of justice will not encourage such wagers by affording aid to either party, and if paid by the stake-holder to one of them, although from the result of the election, under the conditions of the wager, he was not entitled to it, the other can not recover it back. The decisions in the cases of *Morgan v. Pettit*, 3 Seam., 529, and *Smith v. Smith*, 21 Ill., 244, wherein they are in conflict herewith, are overruled: *Gregory v. King*, 38 Ill., 169.

#### GENERAL ASSEMBLY.

When the General Assembly, during an annual session of the Legislature, adjourns for a month, longer or shorter, and the object of such adjournment is that the members may return to their homes, and the business of the session thereby ceases for that time, in such a case, neither the members nor the officers of the two houses are entitled to their *per diem* compensation for the period of such adjournment: *Moren, Lieutenant-Governor, v. Blue*, 47 Ala., 709.

#### GUARDIAN AND WARD.

1. Where a guardian uses the money of his ward in the purchase of lands, the ward is entitled to the results of the purchase, whether the guardian purchased for himself or his ward, and whether he uses the money merely as agent, and not as guardian: *Shelton v. Levis et al.*, 27 Ark. Rep., 190.

2. The proof must be full, clear and conclusive, and, in such case, the person entitled to the money, may, at his election, charge the trustee, guardian or agent personally or follow the money into the land and claim the purchase as made in trust for him, and such trust may be established by parol evidence: *Ib.*

## HIGHWAYS.

A county is not liable, in its corporate capacity, to a private action for injury resulting from a defective highway: *White et al. Adm'rs, v. County of Bond*, 58 Ill., 297.

## HUSBAND AND WIFE.

A husband conveyed land to his wife; a judgment afterward recovered against him was purchased by a third person before the deed was recorded; there being no fraud in the conveyance:

*Held*, that her title would prevail against the judgment: *Morris v. Ziegler*, 71 Pa., 450.

## INFANCY.

In a suit upon a promissory note, if the defendant pleads infancy at the time of the execution of the note, and there is no reply that after the defendant arrived at full age he ratified the contract, evidence of such ratification is inadmissible: *Fetrow v. Wiseman*, 40 Ind., 148.

## INFANTS.

Merely by virtue of his marriage a man is not bound to provide for the children of his wife by a former husband, but if he holds them out to the world as members of his own family, he stands in *loco parentis* to them, and incurs the same liability with respect to them that he is under to his own children: *St. Ferdinand Loretto Academy v. Bobb*, 52 Mo., 357.

## INJUNCTION.

Where an appeal has been taken to the Supreme Court from an order dissolving a temporary injunction, and the judgment below has been affirmed, such affirmation does not dispose of the action below for a perpetual injunction, and it is error to sustain a motion by the defendant to dismiss the action for that cause: *Royle et al. v. The I. P. & C. Railway Company*, 40 Ind., 347.

## INSURANCE.

Insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made, even if that loss be total and the subject-matter of the insurance is then *non existent*, and this intention is expressly evidenced by the clause "lost or not lost," in the policy: *Arkansas Insurance Company v. Bostick & Ryan*, 27 Ark., 539.

## INSURANCE—FIRE.

A condition in a policy of insurance that any other insurance on such property should avoid that policy, unless the assent of the insurer to such increased insurance was indorsed on the original policy, may be waived by acts or positive declarations, and the insurer may be estopped to set up such forfeiture, when by a course of dealing or by open actions the insurer has induced the assured to pursue a policy to his detriment: (*Hutchins v. Western Insurance Company*, 21 Mo., 97, overruled): *Hayward, Assignee of Lennon, v. National Insurance Company*, 52 Mo., 181.

## INSURANCE—LIFE.

A woman engaged to be married to a man has an insurable interest in his life: *Chisholm v. National Capitol Life Insurance Company*, 52 Mo., 213.

## INSTRUCTIONS.

1. An instruction based upon a hypothetical state of facts not found in the case,

ought not to be given, for the reason that it would direct the attention of the jury to issues not involved, and would therefore be erroneous, although such an instruction might state accurately a correct abstract legal principle: *Chicago, Burlington & Quincy Railroad Company v. Gregory, Adm'r.*, 58 Ill., 272.

2. Instructions should always be clear, accurate, and concise statements of the law applicable to the facts of the case. It was never contemplated, under the provisions of the practice act, that the court should be required to give a vast number of instructions, amounting, in the aggregate, to a lengthy address; such a practice is mischievous, and ought to be discontinued. A few concise statements of the law, applicable to the facts, are all that can be required, and are all that can serve any practical purpose in the elucidation of the case: *Adams v. Smith, Ib.*, 417.

#### JOINT TENANTS.

As a general rule, a joint tenant or tenant in common, is not to purchase in an outstanding adverse title to the common property for his own benefit, to the exclusion of his co-tenant, but the co-tenant must, within a reasonable time, make his election to claim the benefit, and to contribute to the expense incurred in the purchase of such title; if he unreasonably delays until there is a change in the condition of the property, or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new acquisition: *Buchanan et al. v. King's Heirs*, 22 Gratt., 414.

#### JUDGMENTS.

A court has control over its orders or judgments during the term at which they are made, and for sufficient cause may modify or set them aside at that term, and when set aside, the parties are remitted back to such rights and remedies, the same as though no order had been made or judgment rendered in the first instance: *Underwood v. Sledge*, 27 Ark., 295.

#### JUROR.

The affidavit of jurors showing that they agreed upon a basis upon which the calculation of the amount to be recovered should be made, and that there was a mistake in making the calculation, can not be received on motion for a new trial: *Withers et al. v. Ficus*, 40 Ind., 131.

#### JUSTICE OF THE PEACE.

If a justice of the peace has no jurisdiction, an Appellate Court to which a cause is appealed from the justice of the peace, has no jurisdiction: *Jolly v. Ghering*, 40 Ind., 139.

#### JUSTICES' COURTS.

In computing the time limited for perfecting appeals from Justices' courts, Sundays are to be included as other days. The principle of *dies non* does not apply in such cases: *Pachin v. Bonsack*, 52 Mo., 431.

#### LACHES.

One whose promises have induced others to act upon them, under belief they would be kept, can not impute laches to others in not discovering his bad faith: *Price v. School Directors*, 58 Ill., 452.

#### LAND AND LAND TITLES.

1. Whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrong-doer on the balance of the land, would be a sufficient color of title under the statute of limitations against the real owner, and

this color of title may be created by an instrument of writing or by an act in pais without writing: *Rannels v. Rannels et al.*, 52 Mo., 108.

2. A statute which provides that "there shall be granted," etc., does not have the effect of making a grant. No title passes by force of the act itself, the words imply that some other act is to be passed before the government parts with the fee to lands which it is provided shall be granted: *Shepley et al. v. Cowan et al.*, *Ib.*, 559.

3. The statute of limitations is a statute of repose. It not only bars, but may transfer a title. The statute does not run against the government: *Ib.*

#### LAND—HOW TO ACQUIRE AND DEFEND TITLE.

1. C. is in possession of land under a settlement in 1771, the settlement right confirmed to him by the commissioners of the district, in September, 1782, and which was surveyed in April, 1783; and he lives upon and cultivates a part of the land, and obtains a patent for it in March, 1791. In July, 1796, W. obtains a patent for a tract of land which covers a part of the tract held by C.; but C.'s cleared land is outside of the interlock, which is in forest; W. not knowing that his patent covers any part of the land held by C. under his settlement right:

*Held*, that C., not having prevented the issue of the patent by caveat, and W. not having known that his patent covered any part of the land so claimed by C., the patent of W. is valid and vests in him the legal title: *Cline's heirs v. Catron*, 22 Grattan, 378.

2. The actual possession of C. outside the interlock, does not constitute an adversary possession by C. of the land within the interlock, so as to require W. to enter upon and take actual possession of it, in order to give him possession under his patent: *Ib.*

#### LANDLORD AND TENANT.

1. A tenant, while the relation of landlord and tenant exists, can not rent from one who has acquired a title hostile to that of his landlord, though it be a better title: *Simmons v. Robertson*, 27 Ark., 50.

2. A tenant who for the better use or enjoyment of leased premises erects buildings thereon, may at any time before his right of enjoyment expires, remove the buildings. If he omit to remove them until his right of enjoyment ceases, and his possession and right to use or occupy the premises becomes wrongful, such omission is to be deemed an abandonment of his right, and the buildings become a part of the real estate; and if the tenant afterwards sever them he becomes a trespasser: *Cromie et al. v. Hoover*, 40 Ind., 49.

3. A tenant who has put trade fixtures into a building has a right to remove them if it can be done without permanent injury to the freehold, provided the right is exercised within a proper time: *Allen et al. v. Kennedy*, *Ib.*, 142.

4. Ordinarily the tenant's holding over and the acceptance of rent by the landlord create by implication a new tenancy, of the same character, annual, quarterly, monthly, and upon the same conditions, as the previous tenancy. Any agreement as to the new tenancy controls and makes it, not an implied tenancy, but one of contract, so far as the agreement affects it: *Bright v. M'Onat*, *Ib.*, 521.

5. The surety being informed by the landlord that the tenant was in arrears, gave him notice that he would not be further liable; the tenant paid the arrears to that time, this did not discharge the surety from the subsequent rent: *Coe v. Vogdes*, 71 Pa., 383.

6. A mere notice of the surety that he would not be liable was no defense; he could not dissolve the contract at his pleasure: *Ib.*

7. The acceptance of rent by a mortgagee, after entry, from a tenant of the mortgagor, whose lease is subsequent to the mortgage, will create the relation of landlord and tenant by the doctrine of estoppel: *Gartside et al. v. Outley et al.*, 58 Ill., 210.

8. It does not follow, however, that the tenancy thus created will be for the whole term of the original lease, and in the absence of a contract operating as an estoppel for the whole term, the tenancy thus created would by analogy to the case of a holding over after a term has expired, be deemed to be from year to year: *Ib.*

#### LIMITATIONS.

1. In express technical trusts, the statute of limitations does not begin to run until the trust is denied by some open act of the trustee: *Smith v. Ricards*, 52 Mo., 581.

2. In implied trusts the statute of limitations begins to run as soon as the party has a right to commence a suit to declare and enforce the trust: *Ib.*

#### MALICIOUS PROSECUTION.

1. In an action for malicious prosecution it is not sufficient, in the absence of probable cause, for the defendant, in order to relieve himself from liability, to show that he acted *bona fide*, and without malice, under professional advice; the advice must be based upon a full disclosure of all the facts in the defendant's knowledge, or which, with due diligence, he might have known. The omission of any material fact, by design or otherwise, will render the advice nugatory: *Cooper v. Utterbach*, 37 Md., 282.

2. Probable cause (for a criminal prosecution) is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense of which he is charged: *Stansbury v. Fogle*, *Ib.*, 369.

3. In an action for malicious prosecution it is not necessary for the plaintiff to show that the defendant was the originator of the proceedings against him; but if the defendant participated voluntarily in the prosecution of the plaintiff, and it was carried on with his countenance and approbation, he is liable in damages, whether there were others who are concerned in it or not, provided the jury find the other facts necessary to render him liable: *Ib.*

4. In order for the advice of counsel to afford protection against an action for malicious prosecution, it must be given upon a full and true statement of the facts within the knowledge of the person seeking the advice, and it must be acted on in good faith, for an honest purpose; and if the person seeking such advice purposely, or carelessly and negligently, fails to give such full statement, the advice of counsel will not afford protection. It is not necessary that the person seeking such advice should be grossly negligent in his statement of facts to render him liable: *Scotten v. Longfellow*, 40 Ind., 23.

5. In an action for malicious prosecution, an allegation of the "falsity of the charge" is not equivalent to an allegation of "the want of probable cause." The guilt or innocence of the party is not the gist of the action. Probable cause may exist in the absence of guilt, and the material allegation in sustaining the action is the "want of probable cause:" *Ib.*

#### MEASURE OF DAMAGES.

1. *In tort* the plaintiff can not in the verdict for damages recover compensation for the trouble and expense of establishing his right: *Stopp v. Smith*, 71 Pa., 285.

2. *In tort* only such damages can be recovered as arose out of the injury: *Ib.*

#### MISTAKE.

1. Mistake as to the facts will not entitle a party to relief in Equity, if the mis-

take arose from negligence or want of such diligence as may fairly be expected from a reasonable person: *Kearney v. Sasser et al.*, 37 Md., 264.

2. A Court of Equity will not relieve on the ground of a mistake in law unless the proof in regard to the alleged mistake is as conclusive as the existence of the legal right which is sought to be restrained: *Ib.*

3. To entitle a party to have a deed reformed on the ground of mistake, it must be shown that the intention and agreement of both parties to the deed were by mistake misrepresented by the terms of the deed: *Nelson et al. v. Davis*, 40 Ind., 366.

4. Where it is sought to reform a written instrument on the ground of mistake, and it is not shown but that the instrument speaks just as the parties desired it should, the mistake is a mistake of law as to the legal effect of the terms of the instrument; and for mistakes of law, except in cases of peculiar character, no relief can be granted: *Ib.*

#### MORTGAGES AND DEEDS OF TRUST.

1. The mere fact that property conveyed by deed of trust is sold under the deed in gross, is not *per se* sufficient to invalidate the sale. There must be some attendant fraud or unfair dealing or abuse of the confidence reposed in the trustee in order to obtain the aid of a court of equity to divest a title acquired under such a sale: *Benkenhoff v. Vincenz et al.*, 52 Mo., 441.

2. Upon the entry of a mortgagee for condition broken, he has the right to treat a lessee of the mortgagor, whose lease is subsequent to the mortgage, as a trespasser, and may bring ejectment without notice: *Gartside et al. v. Outley et al.*, 58 Ill., 210.]

3. When a mortgage contains a power of sale, to be executed by the mortgagee, his heirs or assigns, and the debt secured thereby is of a character assignable by law, an assignee of the debt may execute the power of sale contained in the mortgage: *Mason v. Ainsworth*, *Ib.*, 163.

4. But where the debt is not evidenced by any of the instruments assignable by law, but only by the mortgage itself which is not assignable except in equity, then the mere assignment of the mortgage will pass to the assignee only an equitable title to the debt, and in such case the power of sale in the mortgage does not pass to the assignee, and can be executed only by the mortgagee himself: *Ib.*

#### NEGLIGENCE.

1. While it is the imperative duty of railroad companies to use all reasonable and proper precautions at public road crossings, and everywhere else, to prevent collisions and accidents, still a like duty rests upon the citizen. And where a person, on approaching a railroad crossing with a wagon and team, does not avail himself of his sense of sight and hearing, when by the proper exercise thereof he could have avoided a collision with a train at the crossing, he will be regarded as unusually negligent on his part, and can not recover for the injury resulting, in an action against the company, where the only neglect of the servants of the company in charge of the train was the omission to give the required signals on approaching the crossing: *St. Louis, Alton & Terre Haute R. R. Co. v. Manley*, 58 Ill., 300.

2. A child not quite five years old, and of diseased intellect, strayed to the railroad track, which was near the residence of its parents, in the village of Brighton, and was seriously injured by a train of cars which passed through the village with great speed and without stopping. The mother of the child had left the house but a few minutes before the accident, to perform a necessary household duty, leaving the child in the care of his sister, eight years old, and on her return discovered that he had strayed to the track, and before she could recover him he was struck by the train and seriously hurt. In an action against the company, it was held there was no negli-

gence on the part of either the mother or injured child; but that the company was chargeable with great negligence in permitting one of its fastest trains to run with unabated speed through the town, where persons are liable at all times to be on the open track, and should be held responsible: *Chicago & Alton R. R. Co. v. Gregory, Ib., 226.*

3. Nor in such case can it be said that the parent failed to exercise reasonable care. The same rule should not be applied to persons dependent for support upon their labor and to those whose means enable the parent to give a constant personal attention to the care of children, or employ a person for that purpose: *Ib.*

4. Negligence can not be imputed to a child under five years of age, especially to one of less than ordinary mental capacity: *Ib.*

5. In an action under the statute for a wrongful killing, it appeared, from the evidence, that the deceased was killed on a dark night at the crossing of a public street in frequent use, while attempting to cross a railroad track, by a train of freight cars which had been detached from the engine, and was running along the track under the control of no person, without any light or signal being given of its approach:

*Held*, that these facts constituted great negligence on the part of the railroad company, for which it must be held responsible for the damage sustained: *Chicago & Alton R. R. Co. v. Garvey, adm'r, Ib., 83.*

6. Railroad companies have no right to erect machines, for any purpose, so near the track that the slightest indiscretion on the part of the employee will prove fatal. It is culpable negligence so to do: *Chicago, Burlington & Quincy R. R. Co. v. Gregory, adm'r, Ib., 272.*

7. Railway companies are invested by their charters with the right to use locomotive engines as a propelling power in the exercise of the franchises conferred, upon the implied understanding only, that the law will compel such corporations to use every possible precaution, by the use of all the best and most approved mechanical inventions for that purpose, to prevent injuries by fire and other causes, to the property of the citizens along the line of their respective roads: *Chicago & Alton R. R. Co. v. Quintance, Ib., 389.*

8. The fact that the use of such engines in populous districts through which they pass is known to be dangerous in their most careful use, itself imposes a high degree of responsibility upon the companies using them as a motive power, and in the absence of such a degree of care and diligence on the part of railway companies, they will be held to the strictest accountability for injuries to property in the vicinity of their roads: *Ib.*

9. Experience having demonstrated that railway companies, by the use of certain mechanical contrivances, can prevent the emission of fire sparks from locomotive engines, in such quantities, at least, as not to be at all dangerous to property in the immediate vicinity, they must, in every instance, be held to a strict performance of their duties in that regard: *Ib.*

10. It would seem to be negligence on the part of a railway engineer to use wood in a coal-burning engine while running it over the road, for the reason that the meshes in the wire netting used to prevent the escape of fire sparks are made much larger when coal only is used for fuel, and the fire sparks from wood are much more dangerous, because they retain the fire for a much greater length of time. To use wood, then, in such an engine in a dry time with a high wind prevailing, would be great carelessness and recklessness: *Ib.*

11. A highway must be kept in such repair that skittish animals may be employed without risk: *Lower Macungie v. Merkhoffer, 71 Pa., 276.*

## NEW TRIALS.

1. To authorize the granting a new trial on the ground of after-discovered evidence, four things are necessary: 1st. The evidence must have been discovered since the former trial. 2d. It must be such as reasonable diligence on the part of the party asking it could not have secured at the former trial. 3d. It must be material in its object, and not merely cumulative and corroborative or collateral. 4th. It must be such as ought to produce, on another trial, an opposite result on the merits: *Read's case*, 22 Grattan, 924.

2. That a general verdict for the defendant is contrary to, or in conflict with, special findings, or that special findings do not support the allegations of the answer, or are in conflict with the same, or are inconsistent with the general verdict, is not a reason for a new trial: *Mookler v. Lewis*, 40 Ind., 1.

3. An erroneous ruling upon a demurrer to a pleading is no ground for a motion for a new trial: *Helms et al., ex'rs, v. Kearm, Ib.*, 124.

## PARTITION.

In all cases of partition in any court, a party having made one bid is not entitled to another: *Bartholomew's Appeal*, 71 Pa., 291.

## PARTNERSHIP.

1. Partnership accounts must be settled in one proceeding by account rendered or bill in equity; until there has been a settlement of partnership accounts, assumpsit will not lie for advances unless there has been an express promise to re-pay: *Leidy v. Messinger*, 71 Pa., 177.

2. This rule applies whether the property of the partnership has ceased to exist or not: *Ib.*

3. In a question of partnership, evidence that the connection between alleged partners had been formed fraudulently, and for the purpose of covering the property of one from his creditors, is not admissible: *Thomas v. Moore, Ib.*, 193.

4. Wood conveyed to Meily & Co., declaring in the deed that the land was for partnership purposes; a judgment was entered by Wood, a few days afterward, against one of the firm for his proportion of the purchase money; the partner conveyed his interest in the partnership to his fellows and withdrew; they conveyed the whole:

*Held*, that the judgment was not a lien against the *terre tenants*: *Neily v. Wood, Ib.*, 488.

5. The land was personal property, to be applied according to the equities between the partners, in payment of the partnership debts in the first instance: *Ib.*

6. Each partner's interest was, as in any other property of the firm, what should be due him on a final settlement: *Ib.*

7. An execution by a separate creditor would sell not an interest in realty, but the balance due his debtor, with right by bill in equity to compel a settlement: *Ib.*

8. Where land is agreed to be made partnership stock, there is an out and out conversion: *Ib.*

9. One partner after dissolution of the firm, with notice thereof to the creditor, can not bind the other partners by making a note in the name of the firm, even in renewal of a note of the firm: *Moore et al. v. Lackman*, 52 Mo., 323.

10. A joint judgment procured by partners in business in a slander suit, is no bar to a several suit by one of the partners on the same cause of action: *Duffy v. Gray, Ib.*, 528.

11. In case of the death of one partner, the survivor is a trustee for all persons in-

interested in the partnership, for the creditors of the firm, for the representatives of the deceased partner or his heirs, and for himself; and for the purpose of closing up the business of the firm, he is invested with the exclusive right of possession and management of the whole partnership property and business. His trust being to wind up the concern, his powers are commensurate with the trust; hence he may collect, compromise, or otherwise arrange all the debts of the firm, and his receipts, payments, and doings generally in that behalf, are valid, if honestly done, and within the fair scope and purposes of the trust, and until the debts of the firm are paid, neither the personal representatives nor the heirs of the deceased partner have any beneficial interest in the partnership property: *Offut et al. v. Scott*, 47 Ala., 104.

#### PASSENGER.

1. A purchaser of a ticket must inform himself of the rules governing the transit and conduct of the trains: *Dietrich v. Pennsylvania R. R.*, 71 Pa., 432.
2. The burden is not on the company to show that a passenger had notice of their reasonable rules in running trains: *Ib.*

#### PLEADING AND EVIDENCE.

1. In an action of assumpsit on a policy of insurance, the declaration described the policy as made August 30, 1869, but the instrument offered in evidence bore date August 3, 1869:  
*Held*, the variance as to the date was fatal to the admission of the policy in evidence. The action being upon a written contract, the date was a matter of essential description, requiring precise proof: *Germania Fire Insurance Co. v. Lieberman*, 58 Ill., 117.
2. Where the declaration on a policy of insurance failed to set out the terms and conditions of the policy:  
*Held*, the policy was inadmissible as evidence under it: *Ib.*

#### POSSESSION.

Possession, in order that the statute of limitations may operate in favor of the holder, must be adverse, intentional, actual, continuous and unbroken for the full period prescribed by the statute; if there be an interruption of holding, the term of adverse possession is closed, and, upon resumption of possession, a new point is made, from which limitation will again begin to run: *Byers et al. v. Danley*, 27 Ark., 77.

#### POWER OF SALE.

A power to sell for the purpose of distributing the proceeds amongst persons named in the will, is a power belonging to the executor, *virtute officii*, as well where the power is discretionary as where the direction is absolute: *Evans v. Chew*, 71 Pa., 47.

#### PRACTICE.

1. The Supreme Court has power to review the action of an inferior court in the exercise of its discretion to permit pleadings to be amended, and revise, reverse or affirm the same: *Koons v. Price*, 40 Ind., 164.
2. It is within the discretion of the Judge to permit or refuse leave to withdraw an answer for the purpose of demurring to a complaint: *Bush et al. v. Evans, Ib.*, 256.
3. A party can not complain of the giving of instructions asked by himself *Webb et al. v. Krutz, Ib.*, 323.

## PRACTICE AT COMMON LAW.

In ejectment against two holding different parts of a tract of land, the judgment may be separate against each for the land in his possession, and joint for the costs: *Elys v. Wynne et al.*, 22 Grattan, 224.

## PRACTICE—CIVIL TRIALS.

1. It would undoubtedly be improper to permit a jury to take the attorney's notes of evidence without the consent of the parties or their attorneys. But where such consent is given the circumstance can not be afterwards urged as an objection to the verdict: *Baker v. Rice*, 52 Mo., 23.

2. Where defendant objected to going into the case, and took no further action in the case except to watch its progress, and the clerk's entry was, "neither party requiring a jury, the case is submitted to the court:"

*Held*, that this was a sufficient waiver of trial by jury: *Town v. Moore, Ib.*, 118.

3. Evidence that may form a link in the chain of testimony should be admitted, though not sufficient in itself to establish the defense, and although no disclosure is made at the time of an intention to prove the additional facts to establish the defense: *Budd et al. v. Hoffheimer*, 52 Mo., 297.

4. When in a case where the evidence is conflicting, the court excludes admissible testimony, but afterwards upon re-assembling after a recess decides to admit it, but the witness does not appear, and it does not appear that the party had any opportunity to supply this testimony, the motion for a new trial should be granted: *Ib.*

5. A verdict against the admission of the pleadings can not be suffered to stand: *Foley et al. v. Alkire et al.*, *Ib.*, 317.

6. If a plaintiff sues on a *quantum meruit*, and yet the contract is produced on a trial, if any fact necessary to establish defendant's liability under the contract is not proved, the plaintiff can not recover: *Stout v. St. Louis Tribune Company, Ib.*, 342.

## PRACTICE—CRIMINAL.

1. In prosecutions for misdemeanors, where the proceedings were dismissed, an agreement by the defendant with the Circuit Attorney to pay all costs, including that officer's fee, would be contrary to public policy, and in case of the insolvency of defendant, mandamus will not lie against the county judges to compel the payment of the fee: *State ex rel. Woods v. Warramore*, 52 Mo., 27.

2. Where the subject-matter of negative averment lies peculiarly within the knowledge of the other party, it is taken as true, unless disproved by that party: *State v. Lipscomb, Ib.*, 32.

3. A party who seeks and brings on a difficulty, can not avail himself of the doctrine of self-defense, in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the affray: *State v. Linney, Ib.*, 40.

4. When the jury assess an imprisonment for less term than the law allows, they may modify their verdict under the direction of the court: *Ib.*

5. The court may limit the time of counsel in addressing a jury in a murder case: *Ib.*

## PRACTICE IN EQUITY.

1. The positive denials or statements of an answer responsive to the bill, can not be overthrown by the admissions, evasions, and contradictions, if any, which may be found in the answer: *Powell and wife v. Manson*, 22 Grattan, 177.

2. If a debtor obtains an injunction to a sale of his property under a deed of trust on grounds that are insufficient and unsustained, the injunction nevertheless should

not be dissolved, if the amount of the debt is not certain, until his indebtedness is ascertained by a commission of the court: *White v. Mech. Building Fund Association* 22 Grattan, 233.

3. Where a Court of Equity having jurisdiction, passes an order directing the sale of real estate, the purchasers of such real estate are entitled to be protected, and a reversal of the order of sale would not operate to disturb their titles acquired under it: *Dorsey v. Thompson et al.*, 37 Md., 25.

4. In a case where from the nature of the proceedings and the evidence disclosed by them, the court can see with certainty that the final decree in the cause will require the property to be sold, and there exists a necessity for an immediate sale, the interlocutory order is proper even before the appearance and answer of the defendants: *Cornell & Johnson v. McKann*, *Ib.*, 89.

5. In the most pressing cases, however, where it is practicable or possible, all parties who may be affected by the sale, should have an opportunity to be heard, and to show cause against it before the order is passed: *Ib.*

6. Where the rights involved are purely legal, a Court of Equity will interpose by injunction solely to protect the property until such rights can be determined by a Court of Law; and this protection will only be given in cases where the mischief threatened or impending is likely to be ruinous or irreparable: *Lanahan v. Gahan*, *Ib.*, 105.

7. If one person expends his money in making beneficial improvements on the land of another, upon the faith of a parol contract by the latter to convey, and specific execution of the contract can not be decreed, because of the uncertainty in the proof of its terms, a Court of Equity will decree compensation to the extent of the value of such improvements and in some cases will grant relief by declaring the same to be an equitable lien upon the property: *McNamee, etc., v. Withers, etc.*, *Ib.*, 171.

#### PRINCIPAL AND SURETY.

1. In March, 1862, K. sold personal property at auction on nine months credit, amounting to about \$2,000; F. purchased some of it, and gave his bond for \$501.57, with R. as his surety. On the 10th of April, 1863, K. sold all the bonds to R., including that of F., for Confederate money:

*Held*, R. can only recover of F. the value of the Confederate money he paid K. for the bond, with interest from the date of purchase: *Kendrick et al. v. Forney*, 22 Grattan, 748.

2. To a suit on a joint promissory note for twenty-four hundred dollars, a surety thereon answered, that before the maturity of the note, the plaintiff released him from all liability thereon, in consideration of an order given by him on two other defendants, on his own funds, for five hundred dollars, which order was accepted by them:

*Held*, that this constituted a defense as to said surety, and as the order was not the foundation of the defense, it was not necessary that a copy of it should be given with the answer: *Stockton v. Stockton, Jr., et al.*, 40 Ind., 225.

3. An answer by the other sureties set up the release of the first as a discharge of them:

*Held*, that this was a complete defense: *Ib.*

4. A surety upon satisfying a debt for which he is bound, is entitled to the benefit of all securities, either of a legal or an equitable nature, which the creditor has, or could have enforced against the principal debtor and those claiming under him. The creditor is bound to preserve all such securities for the benefit and protection of

the surety; and if he parts with any of them, or if the benefit of them be lost by his act, the surety will be exonerated to the extent to which he is prejudiced by the act of the creditor. And this right of the surety is the same, although he may not have known of the existence of the securities held by the creditor, or though taken subsequently to the date of the contract of suretyship: *Freaner v. Yingling et al.*, 37 Md., 491.

5. Creditor can not be compelled to resort in the first instance to the principal debtor, or to the securities which he holds for the debt, before proceeding against the surety; nor is there any positive duty incumbent on the creditor to prosecute measures of active diligence; mere delay on his part, in the absence of some special equity, unaccompanied by any valid contract for such delay, will not amount to laches, so as to discharge the surety: *Ib.*

#### PROMISSORY NOTES.

1. Where a promissory note is indorsed by the payee, whose name is followed upon the back of the note by other names in blank, parol evidence will not be permitted to vary the legal effect of the indorsements thus appearing on the note. But where a party places his name on the back of a note, creating a liability in favor of the payee, the presumption is that he intended to assume the liability of an indorser, and nothing more. This presumption, however, may be controlled by parol evidence showing that he intended to assume the liability of a maker, in which case he will be regarded as a joint maker: *Roberts v. Masters*, 40 Ind., 461.

2. To excuse the assignee of a promissory note for not suing the maker, it must be alleged and proved that the maker was openly and notoriously insolvent at the time when judgment might have been obtained by the use of due diligence: *Ib.*

3. Before the assignee of a promissory note can recover of the assignor, he must aver and prove that he has used due diligence, by process of law, to collect the note of the maker, or show that by the use of such diligence no part of the debt could have been collected: *Ib.*

4. The facts relied upon to show that due diligence has been used, must be set out. Whether due diligence has been used in such a case is a question of law for the court to determine from the facts of the case: *Ib.*

5. To constitute due diligence to collect by process of law, the action must be brought against the maker in the first term of the court having jurisdiction, when there is time, between the maturity of the note and the commencement of such term to obtain process: *Ib.*

6. This rule applies though such action be thereby required to be brought the day next after the maturity of the note, unless it be shown that the action could not have been commenced and service obtained: *Ib.*

7 That the maker of the note was possessed of large and valuable property, and was reputed to be entirely solvent at the time suit should have been commenced, is no excuse for not suing: *Ib.*

8. If a promissory note made payable to the order of a particular person, be indorsed by a third person at the time, or before it is signed by the maker, and before it is delivered to the payee, such indorser, in the absence of any evidence to qualify his liability, is to be regarded as an original promisor and liable as such: *Walt v. Alback*, 37 Md., 404.

#### PURCHASER.

The vendee in possession, under a contract of sale, can not retain possession and avoid payment of the balance of the purchase money, on the ground that the vendor can not make as good a title as agreed. Before he can avail himself of such

defense, he must offer to rescind the contract: *Peay, Receiver, v. Capp et al.*, 27 Ark., 160.

#### RAILROADS AND RAILROAD COMPANIES.

1. Where a party claims the right to condemn the land of his neighbor for the construction of a railroad, he must show at least a reasonable degree of necessity for the exercise of such right; and whether such necessity exists or not, is a question to be determined exclusively by the Court specially clothed with jurisdiction and power to pass on the propriety of the inquisition of condemnation: *New Central Coal Co. v. George's Creek Coal and Iron Co.*, 37 Md., 537.

2. Irregularities in taking the inquisition of condemnation, inadequacy of the damages assessed, and all such questions, can only arise and be decided by the tribunal to which the inquisition is required to be returned for ratification or rejection. A Court of Equity can properly exercise no jurisdiction over such cases: *Ib.*

3. When upon proceedings instituted to condemn land for a railroad, the inquisition is returned to the Circuit Court, and before any action is had thereon, the parties seeking the condemnation enter upon the premises described in the inquisition, and commence to construct their road, such conduct is clearly unauthorized, and a Court of Equity will enjoin such unlawful entry until the final action of the Circuit Court on the inquisition, and the actual payment of the damages in the event of the ratification of the inquisition: *Ib.*

4. The negligence of the conductor of a train of cars in putting or assisting a person off the cars, is the negligence of the corporation owning or operating the road; and an allegation of such negligence of a conductor was held to be a sufficient charge of negligence against the railroad company: *The C. C. & I. C. R. W. Co. v. Potel, adm'r*, 40 Ind., 37.

5. A person who, by mistake, gets upon a passenger train other than the one he intends to take passage upon, is, nevertheless, a passenger upon the train he is on, and the relation of passenger and carrier exists between him and the company: *Ib.*

6. Allowing a child under five years of age to be upon a railroad track unattended, where cars are passing hourly, and where its presence may be undiscovered by the persons in control of trains, is negligence in the parent, which will defeat recovery by the parent for injury to the child, unless such injury be willful: *The J. M. & I. R. R. Co. v. Bowen, Ib.*, 545.

#### RECOGNIZANCE.

A writ of *scire facias* stands in the place of both the summons and declaration and should contain every averment necessary to show a right of recovery; and if there is a variance between the recognizance as set out in the writ, and the judgment of forfeiture, advantage of such variance may be taken under the plea of *nil record*: *Farris et al. v. The People*, 58 Ill., 26.

#### REDEMPTION.

The act of Congress of February 25, 1862, known as the "Legal Tender Act," did not operate to authorize a redemption from a sale on foreclosure of a mortgage, had prior to the passage of that act, by payment or tender of United States Treasury notes: *Morrow et al., adm'rs, v. Rainey et al.*, 58 Ill., 357.

#### REMOVAL OF CAUSES.

1. A suit in a State court can not be removed to a United States court, unless the suit might have brought originally in the last court: *Berry et al. v. Irick et al.; Newcomb's ex'rs, v. Bushong*, 22 Grattan, 484.

2. There are several plaintiffs in a suit in a State court, some of whom live out of the State and others live in it, and the interest of all are so connected that the rights and interests of one can not be adjudicated separately. The defendants live in the State. The non-resident plaintiffs are not entitled to have the cause removed to a United States court, under the act of Congress of March 2d, 1867, for the removal of causes: *Ib.*

3. After a decree upon the merits has been made in a suit in a State court, and an appeal has been taken to the Supreme Court of Appeals, and the case is pending in that court, no party has the right to have the cause removed to a United States court: *Ib.*

#### REPUTATION.

In an action for breach of promise of marriage, evidence that the general character of the plaintiff for chastity, previously, was bad, is admissible in mitigation of damages: *Van Storch v. Griffin*, 71 Pa., 240.

#### RESULTING TRUSTS.

1. A resulting trust is a mere creature of equity, founded upon presumptive intention, and designed to carry that intention into effect: *Byers et al. v. Danley*, 27 Ark., 77.

2. It will not attach in the person paying the purchase money, if it was not the intention of either party that the estate should so vest in him: *Ib.*

#### SALES.

1. In summary proceedings like those to subject delinquent lands to sale for taxes, not only must the authority to sell be made to appear, but it must appear to have been strictly pursued, and no intendments can be indulged to uphold them: *Williams et al. v. Underhill*, 58 Ill., 137.

2. A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee, until the condition is performed; and the vendor in case the condition is not fulfilled has a right to re-possess himself of the goods, both against the vendee and his creditors; and if guilty of no neglect, may recover the goods so sold even from an innocent purchaser: *Ridgeway v. Kennedy*, 52 Mo., 24.

#### SCIRE FACIAS.

1. The writ of *scire facias* occupies the place of both declaration and writ of summons, and when the facts set up in the writ are not sufficient to show a cause of action, a demurrer would be a proper response: *Trapnall & Trapnall v. Terry & Steel*, 27 Ark., 70.

2. Where there is no record in the court, as a foundation upon which the writ could properly issue, it is such a matter in abatement as might be reached by motion, and a party is not necessarily compelled to resort to a plea of *null tiel* record. *Ib.*

#### SHERIFFS.

Where an execution against principal and security comes to the hands of the sheriff, and through neglect, want of diligence, favor or extension of time, by the sheriff, he fails to make the money out of the principal, or the principal becomes insolvent, the sheriff becomes responsible to the security for the amount he may be forced to pay: *Hill v. Sewell*, 27 Ark., 15.

#### SLANDER.

There is no doubt where words spoken are actionable *per se*, that mental suffering

produced by the utterance of the slanderous words is a proper element to be considered in fixing the amount of damages. The rule seems to be different where the words are not actionable in themselves: *Adams v. Smith*, 58 Ill., 417.

#### STATE GOVERNMENT.

Between May and November, 1860, D. deposited tobacco, for inspection and storage, in the public warehouse at Richmond, and paid the inspection fees. The tobacco remained in the warehouse until March, 1863, when the warehouse was accidentally consumed by fire, and the tobacco was burned. The present State government is not responsible to D. for the loss: *De Rothschild v. The Auditor*, 22 Grattan, 41.

#### STATUTES CONSTRUED.

Upon the repeal of a penal statute, no penalty can be enforced, nor punishment inflicted for a violation of the law while in force, unless there be some special provision to that effect: *Woodruff v. Scruggs*, 27 Ark., 26.

#### STATUTE OF FRAUDS.

1. The general rule is, if a promise is in the nature of an original undertaking to pay the debt of another, and is founded on a valuable consideration received by the promisor himself, it is not within the statute, and need not be in writing to make it valid and binding; it will be regarded in the light of a contract for the benefit of a third party, upon which such third party may found an action for the breach: *Wiam v. Bevans*, 58 Ill., 232.

2. So, where a purchaser of property agreed by parol, in consideration thereof, to pay certain debts of his vendor due a third person, it was held, the promise was in no wise collateral to or dependent on the liability of the vendor, but was an original and independent promise, and not within the statute of frauds: *Ib.*

3. In order to establish a trust, under the statute of frauds, it is not necessary it should be declared in writing, but it is sufficient if it be manifested and proved by writing: *Kingsbury v. Burnside et al.*, 58 Ill., 310.

4. Nor is it necessary to produce an instrument expressly framed for the purpose of acknowledging the trust; it is fully sufficient if the recognition or admission of it is incidentally made in the course of a correspondence; nor is it material that such correspondence be with a person other than the one claiming to be *cestui que trust*, or that it occurred subsequent to the passing of the title of the trust property to the trustee: *Ib.*

#### SURETIES.

1. When a sheriff, without the consent of the security, through favor or extension of time to a principal, pays off an execution in his hands, against principal and security, and procures an assignment of the execution to himself, equity will enjoin him from proceeding against the security for the amount so paid: *Hill v. Sewell*, 27 Ark., 15.

2. County bonds deposited by A. as security for the payment of his note discounted at bank, which he does not pay, may be made available by a sale of them; and the bank had the right to sell them whilst it held them, and after a transfer of the note and bonds to B. he had authority to sell them: *Alex., Loud. & Hamp. R. R. Co. v. Burke et al.*, 22 Grattan, 254.

3. In such a case A. is entitled to notice of the time and place of sale of the bonds; but if he has actual knowledge of the fact a reasonable time before the sale is to take place, this is sufficient without formal notice: *Ib.*

4. Where a note was so altered as to draw interest a month sooner than it did as it was executed, without the knowledge of the surety on the note :

*Held*, that it released the surety from its payment: *Benedict et al. v. Miner*, 58 Ill., 19.

#### TAXES AND TAX TITLES.

1. On bill by plaintiffs who sue for themselves, and all other tax payers of Scott county, alleging that certain taxes were illegally levied, praying that the Collector be enjoined from the collection of the same, the court granted a restraining order. After appearance of parties on demurrer, the injunction was made perpetual:

*Held*, 1st. That the Circuit Courts of this State, under the present Constitution, though creatures of the Legislature, have the same jurisdiction that they possessed prior to its adoption, and they are clothed with all the powers conferred upon them by the Constitution of 1836.

2d. While the present revenue law prescribes the manner in which a party aggrieved may apply to have the appraisement or the valuation of his property corrected, there is no provision to correct an illegal or erroneous levy by the County Court, and in such case he must look to the superintending control and appellate jurisdiction of the Circuit Courts over the County Courts, and where no remedy by appeal is provided by the act, he would be entitled to relief by *certiorari* or prohibition; and under these writs the Circuit Courts may revise the proceedings of the County Court; and if from the record it appears that the county has proceeded in a matter outside or in excess of its jurisdiction, the proceedings may be stayed or quashed by prohibition, to the extent of the illegality, or quashed as to the whole, on *certiorari*.

3d. Where it is desired to correct an error which exists *de hors* the record, as where the levy on the face of the proceedings to impose it, is a valid lien on land, and extrinsic evidence is required to show its invalidity, neither the writ of *certiorari* or prohibition are of any value, and in such a case a court of equity will interfere to prevent a multiplicity of suits, irreparable injury or a cloud upon title to real estate.

4th. Where the error or illegality appears of record, and the tax payer does not choose to avail himself of his remedy by *certiorari* or prohibition to prevent the evil, he may have his action of trespass against the officer, of his property, and replevin will also lie to recover personal property seized or sold, in whosoever hands it may be. Or where the proceedings imposing the tax are regular on their face, and the tax is paid under protest to avoid sale, the party may have his action to recover the money so paid.

5th. Where the proceedings are void upon their face they form no cloud upon title, and no ground of interference by a court of equity, and if they are not void upon their face, but merely voidable or irregular, a court of equity will not take cognizance of them, unless facts are alleged sufficient to bring the matter within some acknowledged head of equitable jurisdiction: *Floyd v. Gilbreath et al.*, 27 Ark., 675.

#### TENDER.

Where property is contracted to be delivered "from the 15th to the 28th" of a specified month, both the 15th and the 28th are to be excluded; and in a suit upon such contract, evidence of an offer or tender on the 28th is improper; and a pleading alleging a tender on the 28th is bad: *Newby v. Rogers*, 40 Ind., 9.

# TESTAMENTARY WRITING.

1. No formal words are necessary to make a valid will, if the substance be testamentary: *Patterson v. English*, 71 Pa., 454.
2. A gift or bequest after death is of the essence of a will, and determines the writing to be testamentary: *Ib.*
3. Whether a writing is a will does not depend upon the maker declaring it so, when he executes it, but upon its contents: *Ib.*
4. A will of personalty must be complete on its face, or if incomplete, it must appear that it was intended to operate as a will in its unfinished state: *Ib.*
5. A paper alleged to be a will, all in the decedent's writing, a date not in his writing was at the head; the presumption is that it had been written with his knowledge *before* the body of the paper, and that it is its true date: *Ib.*

# TIMBER.

1. S. conveyed land to M., reserving timber for his own use and advantage; in case M. should want to clear the land, the owner of the timber to take it off by being notified thirty days previous:  
*Held*, that the timber was personal property: *McClintock's Appeal*, 71 Pa., 365.
2. In reservations of growing timber, whether it be personalty or realty, depends on the nature of the contract and the intent of the parties: *Ib.*
3. If an immediate severance is not contemplated, such reservation is an interest in land; if an immediate severance is in view, it is personalty: *Ib.*

# TOWNS.

Incorporated towns have no authority to require a license of any person for retailing intoxicating liquors within their limits: *Deutschman v. The Town of Charleston et al.*, 40 Ind., 449.

# TRESPASS.

1. A verbal agreement to sell and convey, for a valuable consideration, all the personal property the vendor then had, and all that she might thereafter acquire, and die possessed of, is inoperative to pass the legal title to the subsequently acquired property, so as to enable the vendee to maintain trespass or trover for its asportation and conversion: *Wilson v. Wilson*, 37 Md., 1.
2. And in an action by the vendee for the asportation and conversion of the property embraced in such contract of sale, the burden of proof rests upon him to show what articles, among those claimed, the vendor had at the time the contract was made, the defendant conceding his liability for all articles taken by him as were in the possession of the vendor at the date of the contract. Without such proof the jury would have no standard of damages upon which they could base their verdict: *Ib.*

# TRUSTS AND TRUSTEES.

1. The powers of trustees are strictly construed, and no presumptions are indulged in their favor, and in case of necessity for extended powers, the trustee must act under the direction and orders of a court of competent jurisdiction: *Owen v. Reed et al.*, 27 Ark., 122.
2. A resulting trust may be set up by parol testimony against the letter of a deed; and a deed absolute on its face may, by like testimony, be proved to be a mortgage. But the testimony to produce these results must in each case be clear and unquestionable. Vague and indefinite declarations and admissions, long after the fact,

have always been regarded, with good reason, as unsatisfactory and insufficient. For comment on such evidence, see the opinion: *Phelps v. Seely et al.*, 20 Grattan, 573.

3. To say that every instance of trust is without the statute of limitations, would be stating the rule too broadly. A distinction has been taken when the trust is a continuing one between the parties, or where the trust has been created by will. In such cases the statute will not apply: *Albrect, adm'r, v. Wolf, adm'r*, 58 Ill., 186.

4. The rule is well established that so long as the duties of the trustee remain undischarged, the trustee can not avail himself of the statute of limitations for his defense. But if the trustee openly denies the trust, and acts adversely, the statute will begin to run, and may ultimate in a bar to the rights of the *cestui que trust*: *Il.*

#### UNITED STATES COURTS.

1. An order made by a court of this State removing a cause commenced by a citizen of another State against a citizen of this State, to a court of the United States, on an application made for that purpose under the acts of Congress, puts an end to the cause so far as the State court is concerned, if the order is allowed to remain in force and be carried out; and such an order or judgment is so far final as to authorize an appeal to the Supreme Court of the State; *The City of Aurora v. West*, 25 Ind., 148, overruled on this point: *Burson et al., adm'rs, v. The National Park Bank*, 40 Ind., 173.

2. If such an order is applied for and refused by the State court, the refusal is in no sense a final order or judgment, and no appeal will lie until the cause is finally disposed of by the State court; then, if the question is properly reserved, it can be presented for review: *Ib.*

#### VENDOR AND PURCHASER.

1. A., in a complaint against B., alleged that he purchased of B. certain real estate for the agreed price of two thousand two hundred dollars, and paid two hundred dollars of the purchase money, and took a bond of B. for conveyance and delivery of possession on the payment of the residue of the purchase money; that he afterward paid sixty-five dollars of the residue; and that afterward B. made and delivered to C. a warranty deed for the same land, for the consideration of two thousand five hundred dollars: Prayer, that the contract between A. and B. be declared rescinded, and that A. have judgment for the purchase money by him paid to B.:

*Held*, that the complaint was good: *Dantzeiser v. Cook*, 40 Ind., 65.

2. To the above complaint B. answered that after the title bond was made he offered to convey to A., and at the same time asked A. to pay the residue of the purchase money, and that A. replied that he would not receive a deed for the land, and would not pay the money, saying that he could do better with his money: Prayer for damages by reason of the refusal of A. to comply with the contract:

*Held*, that the answer was bad; that B. might have held A. to the contract, but if, instead of this, he sold and conveyed to another party, he thereby evinced, in a decisive and conclusive manner, his concurrence in the rescission of the contract between himself and A.; and under such circumstances the contract might be considered as rescinded by agreement, and B. could not recover damages for an assumed breach of the contract, but A. could recover of B. the money paid upon the contract: *Ib.*

3. While a vendor may, by an action for the specific performance of a contract against the vendee, compel the acceptance of the conveyance of the land sold and the payment of the purchase money, yet when the suit is for damages against the

vendee for a breach of the contract in refusing to accept the deed and pay the purchase money, the measure of damages is the difference between the contract price and the value of the land at the time when the deed should have been accepted, if at that time there was any decrease in such value: *Porter & Travis, Ib.*, 556.

4. In this case the house and lot had been owned by G., who sold and conveyed it to M. Whilst G. owned it, she being a member of a building fund association, borrowed from it \$2,000, and gave her bonds in the penalty of \$4,000, and a deed of trust to K. to secure her liabilities to the association. She had paid up all dues until December, 1863; but there was an uncertain amount to which the property was still liable, and this could only be ascertained by a suit in equity and an account; and this incumbrance was unknown to C. at the time of the contract. The house had been consumed by fire before proceedings were instituted by W. against C. to enforce the contract:

*Held*, in a contract for the purchase of a fee-simple estate, if no incumbrance is communicated to the purchaser, or be known to him, he must suppose himself to purchase an unincumbered estate: *Christian v. Cabell*, 22 Grattan, 82.

5. The objections which a purchaser may make are not entirely confined to a doubtful title. It applies to incumbrances of every description which may in any way embarrass the purchaser in the full and quiet enjoyment of his purchase: *Ib.*

6. There is a difference between a defined and admitted charge to which the purchase money may, by consent, be applied when it comes due, and a contested charge, which will involve the purchaser in an intricate and tedious lawsuit of uncertain duration: *Ib.*

7. In some instances the court will decree specific performance if the vendor is prepared to comply with his covenants at the hearing; and the court will afford him a reasonable time to remove the incumbrances and perfect his title. But this is a matter of favor to the vendor, only to be granted in cases which admit of such relief without prejudice to the rights of the vendee: *Ib.*

8. A person in possession, under an executory contract, buying in a better title than his vendors, can derive no advantage from it against the vendor, and the same will inure to the benefit of the vendor, under whom he entered, and all that he can demand is the sum he paid for the better title, with interest: *Lewis & wife v. Boskins, adm'r*, 27 Ark., 61.

9. The court will not give time to the vendor when the defect to be remedied was known to him or his attorney at the time of the contract, and was concealed from the purchaser: *Ib.*

10. Especially will such indulgence be denied to the vendor when, besides a failure to disclose the existence of incumbrances, an account is necessary to ascertain the state of the title, the extent, nature and amount of such incumbrances: *Ib.*

11. The purchaser of real estate is the owner from the date of the contract, when the vendor is in no default, and is prepared to convey a clear title. But he is not the owner till the vendor can make a title according to the contract: *Ib.*

12. Any loss occurring to the property before the vendor is in a condition to convey a clear unincumbered title must fall on him, and not on the purchaser: *Ib.*

13. The house having been consumed by fire whilst the incumbrance on the property still existed, so that W. could not make a good title to it, the loss must be borne by B. and her children, and not by C.: *Ib.*

#### VENDOR'S LIEN.

It is indispensably necessary to the existence of a vendor's lien that the parties should stand in the relation to each other of vendor and vendee; it arises out of, and is incident to, the purchase, and is founded upon an implied trust between the

vendor and purchaser, and the law does not authorize the vendor to transfer this lien with the note taken for the purchase money, even though he expressly professes to do so: *Hecht v. Spears, adm'r*, 27 Ark., 229.

#### WILLS.

1. Beneficiaries under a will, being parties to the action, are competent witnesses in establishing it: *Gamache v. Gambs, adm'r, et al.*, 52 Mo., 287, Ewing, J., dissenting.

2. The following clause in a will, "To my son, Algernon R. Jones, his wife, and his heirs, seven-thirtieths (7-30) of all my estate," created a tenancy by entireties in Jones and his wife, and he could not alienate the land, nor could it be sold on execution against him to her prejudice: *Jones v. Chandler*, 40 Ind., 588.

3. The undue influence necessary to overthrow a testamentary disposition of one's estate must be of such a character as to dominate the will of the testator, and substitute the will of another in its stead. There must be such importunity or coercion as could not be resisted, so that the motive impelling the testator is tantamount to force or fear: *Leeper, ex'r, v. Taylor and wife*, 47 Ala., 221.

4. A person capable of executing a valid deed or contract has the legal capacity to execute and acknowledge a will or codicil: *Tyson et al. v. Tyson's Executors*, 37 Md., 567.

5. Undue influence to invalidate a will must be such as to deprive the testator of his free agency, and to subordinate his will to that of another; thus making the testamentary act not the will of the testator, but that of the person exercising dominion or control over him: *Ib.*

#### WITNESS.

1. M., a witness called to prove the signature of B., a party to a instrument, said he was not familiar with the handwriting of B., never having seen her write but once, and then only to make her signature, that he would not be able, from his knowledge of her handwriting to distinguish it from that of others, but that he was of opinion, from having compared the present signature with the one he had seen her make, it was her handwriting. M. was a competent witness, and the evidence was admissible: *Pepper v. Barnett*, 22 Grattan, 405.

2. In impeaching a witness or sustaining him, the examination is not confined to his general character for truth, but may extend to his general character: *DeKalb Co. v. Smith*, 47 Ala., 407.

# DIGEST OF RECENT UNREPORTED DECISIONS.

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[SUPREME COURT OF TENNESSEE, DECEMBER TERM, 1873.]

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## ACCOUNT.

It is not necessary to have an account, authenticated as required by statute, itemized: *Maderie & Co. v. Tolund & Cowan*.

## ADMINISTRATION.

Inventories and settlements made by administrators and executors with the County Court, and spread upon the records of such Courts, have the verity of judicial proceedings, and are conclusive against such representatives, unless mistakes can be shown. But are only *prima facie* evidence in favor of such representatives: *Snodgrass v. Snodgrass, Adm'r, et al.*

## AGENCY.

1. A shipper draws a bill at thirty days, and ships cotton to meet the bill, and gives the merchant direction as to the time of sale of cotton, but adds to the instruction that the cotton must meet the bill:

*Held*, that the cotton must be sold within the thirty days, and if the merchant fails to sell within that time, and loss result from his failure to obey instructions, he must sustain it: *Johnson v. Wade*.

2. Factors may, in the exercise of a sound discretion, sell at any time produce consigned to them, in order to re-imburse themselves for advances made to the consignor, unless they have limited their power to do so by a special agreement with the consignor: *Bell, Harris & Co. v. Hanna & Owen*.

## APPEAL BOND.

In an appeal from a judgment rendered on a certified account from another State, it is only necessary to give bond for costs and damages, and not for double the amount of the judgment: *Maderie & Co. v. Toland, Cowan & Co.*

## ASSAULT AND BATTERY.

Where an officer by misrepresentation obtains money from another and applies to the satisfaction of an execution in his possession, the party from whom the money is obtained, may use such violence as may be necessary to regain possession of the money, without being guilty of an assault and battery: *Anderson & Austin v. The State*.

## ATTACHMENT.

A non-resident defendant in an attachment suit against whom a judgment by default has been taken, has twelve months within which to file his application, and show cause why the judgment should be set aside. If the application is filed in the proper office within that time, it is a compliance with the law, though the court may not be actually in session, for by the contemplation of our organic law the courts are always open: *Bledsoe v. Wright*.

**ATTORNEY.**

An attorney by right of his general authority as such, has the right to receive current funds in payment of a judgment, on condition that if his client objects, that the money will be returned, even when he has special instructions not to receive such funds; and if the funds are not returned in a reasonable time, it will be a good payment as between the creditor and debtor, though the attorney, by the violation of his special instructions, ceased to be the agent of the judgment creditor: *Glass, Ex'r, v. Davidson et al.*

**BANKS.**

The removal of the assets of a bank from its place of business, for the purpose of security, does not deprive the cashier of the bank of the power to receive payments on notes held by such bank: *Bank of Tennessee v. Russell & Gracy.*

**BASTARDY.**

The proceedings in bastardy cases are of a criminal character, and Criminal Courts have jurisdiction of such cases: *Crawford v. The State.*

**CANCELLATION OF DEED.**

A deed made in consideration of past adulterous intercourse, will not be set aside because of the immorality of the consideration, nor on the ground of public policy: *Rivers v. Jarnigan et al.*

**CAPTURED PROPERTY.**

The law of nations requires the captors of property to hold the same for twenty-four hours before title will be divested out of the original owner. And if it be recaptured within that time, the rights of the original owner are restored. Referring to 4 Heis., 348: *Wilburn v. Heath et al.*

**CHARGE OF COURT.**

If a party desire additional charge to that given by the Judge, he should ask for it. Otherwise the cause will not be reversed because the charge was not as full as desired: *Bell, Harris & Co. v. Hanna & Owen.*

**CHAMPERTY.**

The absolute assignment of a right of action that would descend to the personal representative of the assignor, is not champertous, unless the assignee assumes the payment of costs. This case distinguished from the case in 10 Hum., 344: *Spicer v. Jarratt et al.*

**CHANCERY JURISDICTION.**

1. The Chancery Court has the power under the provisions of the Code to order the sale of real estate for re-investment which is subject to a contingent remainder, owned by persons under disability and others that may come into being, if it appear that the property is non-productive and that the owner of the real estate, and father of the contingent remainder-men, has no other means by which to support his minor children, and that it would be to the interest of all parties that the real estate be sold: *Williams v. Williams.*

2. A Chancery Court has power to order the transfer of trust funds from one State to another upon a proper case being made out: *Bright et al. v. Bright et al.*

3. A party may waive tort and sue as upon an implied promise, and thus give a Chancery Court jurisdiction of the subject-matter. And such a bill may be filed

against the personal representative as well as against the party committing the act: *Baker & Holl v. Huddleston et al.*

CHANCERY PRACTICE.

1. A Chancellor has no power to appoint a receiver as a condition of a continuance, a good cause having been shown for such continuance. Especially where neither motion nor petition for receiver has been made, and when it does not appear that the property in the possession of the mortgagor is in danger of loss or destruction: *Chadbourn & Co. v. Henderson.*

2. A Chancellor can pass upon exceptions to an answer only in right of his appellate power to revise the decision of the Clerk and Master: *Wood v. McFerrin.*

3. Where a consent decree by mistake orders the sale of land without the equity of redemption, and the judgment debtor discovers the mistake before the sale, and permits its confirmation without exception to it, he is held to have waived his right of redemption: *Owens v. Hawkins.*

4. Irregularities in obtaining judgments by motion on sale notes, given for land sold under a decree of the Chancery Court, can only be taken advantage of by petition in the cause or by an original bill it can not be done by an appeal from the judgment: *Thompkins v. Lillard.*

5. A bill can not be dismissed on motion because the complainant has failed to proceed with the prosecution of his cause. The defendant should make a rule on the complainant in the clerk's office, of which he is to be notified by the clerk. If he then fail to proceed with his suit, the Chancellor, at the next term of the court may, unless good cause is shown for the failure, make a peremptory rule fixing the time within which the step shall be taken, and if not complied with, the cause shall be dismissed: *Ford v. Bartlett et al.*

6. A bill filed for the purpose of having an administration of an estate, is a general creditors' bill, whether it states or not on its face that it is on behalf of all of the creditors: *Baker & Hull v. Pendleton et al.*

7. An agent's authority to swear to a bill will be presumed in the absence of evidence to the contrary: *Ib.*

8. A party can not be made a defendant to a cross-bill unless he is a party to the original bill; but if such defendant do not demur to the cross-bill it may, as to him, be treated as an original bill, if it do not embarrass the relief sought by the complainants in the original bill: *Odum et al. v. Odum, Tulley et al., and Tulley v. Fisher & Jetton.*

9. There is no statute and no case that requires personal service of process upon minors that have general guardians; and the acceptance of service by the guardian for the minor is all that is required by the law. And it follows that judgment taken on such service is not void: *Mitchell v. Cope et al.*

10. The parties to the suit alone, and not a purchaser under a decree in the suit, have the right to take advantage of irregularities in the proceedings had in such cause: *Ib.*

11. This court has adopted the English practice, holding that a bid at a Chancery sale is a mere offer to purchase, and not complete until confirmed. And that a mere advance bid large enough in amount is sufficient to open the bidding. Referring to cases decided at Knoxville and Jackson: *Wilson & Co. v. Jackson.*

12. It is too late at the hearing to set a plea in abatement for hearing, or move to take it from the files: *Seifred v. Peoples' Bank.*

13. A plea in abatement with negative averments should be supported by an answer only in those cases in which the bill states or charges facts by way of evidence of complainant's rights: *Ib.*

14. A party who files his attachment bill to reach property of the defendant that he alleges is not included in the deed of trust, which he does not seek to set aside because of fraud, if he fail in his object is not entitled to a judgment for the amount of his debt. But he would have been entitled to his judgment if he had sought to set aside the deed for fraud, and have failed in his object: *Ib.*

#### CHANCERY SALES.

As soon as judgments on sale notes have been taken, a final decree in the cause may be entered ordering the land to be sold for cash without the equity of redemption: *Hillman et al. v. Maney et al.*

#### COMMON CARRIER.

1. A common carrier may, by special contract with the shipper, limit his common law liability, but to do this a general notice is not sufficient, nor an indorsement on the receipt, though referred to on the face of the receipt. But an express assent of the shipper will be sufficient, and it is not necessary for him to sign it: *Ohrill v. The Adams Express Company.*

2. The general presumption is that the shipper is apprised of the contents of the receipt and has assented to its terms: *Ib.*

3. That if a common carrier can stipulate for release from liability from fire, may do the same as to robbery: Referring to 3 Wallace, 107. But can not make such stipulation as to fraud or diligence; nor as to any of them, if it appear that the shipper was in the power of the common carrier so as to leave him no discretion: *Ib.*

4. If a common carrier transport at a certain rate, with all its common law liabilities, and contracts with a shipper at the same rate, but limiting liability, the contract is void for want of consideration: *Ib.*

5. Under all the circumstances, the agent at Louisville would have the power to make a contract with the carrier limiting its common law liability: *Ib.*

#### CONSIDERATION.

The forbearance of a purchaser of real estate, subject to the equity of redemption, to take possession of the same, is a sufficient consideration to support a promise by the debtor who was still in possession, to pay rent for the land: *Müller, Adm'r, v. Buchanan.*

#### CONSTITUTIONAL LAW.

1. The Legislature has the constitutional power to regulate the carrying of arms so as to prevent crime. And in the exercise of this power, it has the right to regulate the manner of carrying the army six-shooter, so as to make the carrying of this weapon in any other manner than that prescribed by the statute an indictable offense. Freeman, J., dissenting: *The State v. Welburn.*

2. The Legislature has the constitutional power to organize new counties, subject to the prohibition that the line of such new county shall not run nearer than eleven miles to the court-house of the old county: *Speck v. The State.*

3. The act of the Legislature establishing the new county of Moore is valid upon its face, as it does not appear from said act that the line of the new county is not eleven miles from the court-house of Lincoln county: *Ib.*

4. That a crime committed within the territory of the county of Moore, as established and organized in pursuance of the act of the Legislature, and over which the

county of Moore exercises jurisdiction is properly triable in the county of Moore, although the act may have been committed within eleven miles of the court-house of Lincoln county and within its constitutional limits: *Ib.*

5. That a trial in the political organization, as established by the Legislature, within which the crime was committed, is a satisfaction of the guarantee of the Constitution that the trial shall be had in the county where the offense was committed: *Ib.*

6. That the Act of the Legislature establishing the line of Moore County nearer than eleven miles to the Court-house of Lincoln County is not void, but only voidable; and its constitutionality can only be questioned by those who have a right to take advantage of it, and not by strangers. And as Lincoln County alone has the right to question its validity, so long as it acquiesces, the jurisdictional rights of Moore County over such territory can not be questioned in any collateral proceeding in the courts of either county: *Ib.*

7. Every Act of the Legislature, not palpably unconstitutional upon its face, is valid until it has been declared unconstitutional in a judicial proceeding instituted for that purpose, or until some proceeding is instituted to enforce the act; or to declare some right under the act affecting life, liberty or property: *Ib.*

8. The right of trial in the county in which the crime was committed, is a personal right, which is controlled by the law fixing the boundaries of the county. It is not such a vested right as to authorize him to require the Court to determine whether the boundaries of the county are constitutionally established or not: *Ib.*

#### CONTRACTS.

A contract made with a common carrier during the late war will be construed in connection with Treasury regulations of the United States. And no contract will be presumed to be made in violation of such regulations. "Received one package of merchandise, marked L. Olwill, Nashville, Tenn., care of J. C. Buckle, Louisville, Ky., which, it is mutually agreed, is to be forwarded to our agency nearest or most convenient to destination." Destination construed to be Louisville, as the regulations forbid the shipment of goods directly to Nashville during the war to private individuals, unless by special permit, which was to be obtained at Louisville: *Olwill v. The Adams Express Company.*

#### COSTS.

It is not necessary to obtain a judgment for a larger sum in the Circuit Court on an appeal from a judgment of a J. P., than was obtained before him, in order to carry costs in favor of the appellant: *Stewart, adm'r, v. Smith.*

#### CRIMINAL PRACTICE.

1. A deputy sheriff has no power to take bail of a prisoner previous to his examination and commitment by a magistrate. A bail bond so taken is null and void as to the prisoner's sureties: *The State v. McCoy et al.*

2. The courts can not supply the omission of a word in an indictment: *The State v. Gentry.*

3. The failure of the Court to enter judgment against the prisoner at the term the verdict was found, does not deprive the Court to render a judgment on the verdict at a subsequent term: *Greenfield v. The State.*

4. This Court will take judicial knowledge of the proper person to prefer an indictment: *Ib.*

## DAMAGES.

1. A suit for damages by the administrator of a party killed by the defendant, will not be barred by the fact that the deceased was in the act of stealing poultry from the defendant at the time of the killing: *Marks, adm'r, v. Borman*.

2. To excuse such killing, it must be done not simply to protect property from simple larceny where there is no force or personal danger, but there must appear to have existed a necessity to repel force with force to the extent of killing: *Ib.*

## DURESS.

The party threatened or endangered is not required to first submit to wager of battle in order to complete the duress: *Loopen v. Phelps et al.*

## EVIDENCE.

1. Where a will is contested on the ground that the testator labored under insane delusions, it is competent to introduce evidence to show that the opinions charged to be delusions were based upon facts obtained from other parties: *Hatcher v. Taylor*.

2. Where the instrument is lost upon which suit has been instituted, the affidavit made by the plaintiff of the loss of the instrument, is not proper evidence to go before the jury: *Edwards, adm'r, v. Harris*.

3. In order to prove the handwriting of a party, it is not admissible to introduce other papers bearing his genuine handwriting to the jury which have no other bearing upon the case than to prove handwriting: *Wright v. Hessy*.

4. The declarations or admissions of a party after he has parted with his interest in the property, are not admissible to impeach the right of those who have acquired an interest in such property: *Ib.*

5. In an action of breach of covenant to keep in repair fences around a farm rented to plaintiff, it was held error to admit proof as to promise defendant made a third party to build a fence on the place: *Vaughan v. Vaughan*.

6. A witness may give his impression as to a fact, but it is weaker in its force as evidence than a more positive form of evidence, but still it is admissible: *Bank of Tennessee v. Russell et al.*

7. In bastardy cases, on the cross-examination of the mother of the bastard, the defendant has the right to ask if she has not had sexual intercourse with other persons between the first of the tenth and the first of the sixth month previous to the birth of the child: *Crawford v. The State*.

8. The Governor's pardon of a person convicted of an offense, to which is attached by statute the penalty of being incompetent to testify in a court of justice, does not restore his competency to testify in a court of justice: *Evans v. The State*.

9. Notwithstanding the incompetency is a part of the punishment, it is also a rule of evidence, and this rule remains unchanged by the executive pardon: *Ib.*

## EXCEPTIONS—BILL OF.

A bill of exceptions is necessary to make the charge of the Judge in a criminal case a part of the record even under the Act of 1873: *Huddleston v. The State*.

## FEME COVERT.

1. Chancery Courts have power to settle the property of a minor *feme covert* which is in the possession of her guardian, upon her to her sole and separate use, where a bill has been filed by her guardian for that purpose, in which it is stated that the husband is improvident and wasteful: *Murphy v. Greene et al.*

2. This will be done even where the *feme covert* is defendant and opposes the settlement: Citing 10 Hum., 199. And to authorize the courts to make such set-

tlement, it is not necessary that the husband should be seeking through the courts to obtain possession of his wife's property: *Ib.*

3. The contract of a *feme covert* in the purchase of real estate is not void, but only voidable at her instance; as to third persons it is valid: *Johnson v. Johnson et al.*

4. Where a husband abandons his wife, her capacity as a *feme sole* is thereby restored, and all her contracts made after the abandonment are as valid as though she were a *feme sole*: *Ib.*

5. Though the deed of a *feme covert*, made without her privy examination, is absolutely void, and if she sues for the rescission of the contract, the deed will be cancelled, with condition that the purchase money paid upon the land with her assent will be declared a lien upon the land: *Eldridge and Wife v. Gardenhire et al.*

#### FRAUD.

1. The recital of a false consideration in a deed, or other instrument, is an evidence of fraud: *Thurman v. Jenkins & Dickson.*

2. Where a person trades with another in embarrassed circumstances, and obtains property at a third of its value, and is attended with the slightest suspicion as to the *bona fides* of the transaction, it would be inequitable to permit the purchaser to have more of the property than would reimburse him for money advanced with interest thereon: *Collier v. Francis et al.*

3. It is a badge of fraud for a party in failing circumstances to retain his vendor's lien by a separate unrecorded instrument, instead of retaining upon the face of the deed conveying the property, which recites that the purchase money has been paid: *Summers v. Howland et al.*

4. In the absence of fraud, a retiring partner may take a part of the firm assets, and hold them under the exemption laws against the creditors of the firm, when he left sufficient firm assets to pay all the firm debts, and the other partner stipulated to pay such debts, and afterwards both partners became insolvent: *Hollins, Wright & Co. v. J. & E. D. Staly.*

#### HOMESTEAD.

1. The homestead exempted can not, in an absolute sense, be said to be an estate in the land. The law creates none, and leaves the fee intact, only declaring that the homestead shall continue to exist only so long as the land is occupied as a home: *Hicks, Adm'r, v. Pepper.*

2. The widow or minor children may lose the homestead by acts *in pais*, such as the permanent abandonment of the homestead, and the acquisition of another domicile: *Ib.*

3. And after the loss of the homestead by acts *in pais*, the land is subject to the debts of the former occupants in the same manner as other property: *Ib.*

#### INJUNCTION.

The Chancery Court has no jurisdiction to grant an injunction to restrain a person from conveying away his property before the complainant can obtain a judgment in a suit pending at law. In such a case the complainant has a clear and unembarrassed remedy at law by ancillary attachment: *Brewington v. Henry et ux.*

#### JUDGMENTS.

Where the judgment of a Magistrate shows upon its face that the J. P. did not have jurisdiction of the subject-matter of the suit, such judgment is null and void, and may be attacked collaterally. Such is the case where the judgment was for five

hundred dollars, and it appeared to have been rendered on an open account: *Summer v. Jarratt et al.*

#### JURY.

The verdict of a jury must be unanimous, impartial and without coercion. And any act of a Judge that savours of coercion, will vitiate the verdict. And such an act is the order of the Judge to the sheriff, in the presence of the jury, to lock them up until they have agreed: *Hancock v. Flam.*

#### LIMITATIONS.

1. Courts of law can make no exceptions to the Statutes of Limitation, and a replication to the plea of the statute, that the cause of action was fraudulently concealed until the cause was barred, and suit as soon as discovery of the right of action, is demurrable: *Peck v. Bush et ux.*

2. But the replication to the plea of the statute, of the suspension of the Courts, is a good plea, as the organic law makes this exception, by guarantying to the citizen that the Courts shall remain open: *Ib.*

3. The uninterrupted adverse possession of personalty acquired in good faith, and without force or fraud, for the period of three years, vests absolute title in such holder. And he has a right of action to recover the property from its original owner, who has obtained possession of it without the consent of such holder: *Vaughn v. Roberts.*

4. And the holder has this right of action regardless of the fact that the person from whom he obtained the property had stolen it from the original owner: *Ib.*

5. Previous to the adoption of the Code in May, 1858, there was no Statute of Limitation applicable to an action of debt founded upon a bill single or writing under seal: *Keeble v. Tompkins.*

6. The provisions of section 2775 of the Code, which applies the term of six years to all actions on contracts not otherwise provided for, is applicable to contracts between indorser and indorsee: *Halbert et al. v. Seauright et al.*

#### MOTIONS.

1. The death of one of the partners in whose favor the judgment was rendered, and one of the defendants, before the issuance of the execution, is no excuse for the failure to return such execution: *Everett et al. v. Smith et al.*

2. Where a person might act as deputy sheriff or constable, the party moving against him must show in which capacity he acted, otherwise a judgment taken against him will be erroneous: *Robertson et al. v. Glenn.*

#### MORTGAGE.

1. Property mortgage must be specifically described, any doubt or ambiguity as to the property mortgaged will make the instrument an executory contract and not a mortgage. And the rights of attaching creditors will prevail over the rights of the party claiming under such an instrument: *Thurman v. Jenkins & Dickson.*

2. Where there is a stipulation in a mortgage to the effect that the mortgagor shall remain in possession of the mortgaged property until the foreclosure of the mortgage, the mortgagor will be entitled to the rents up to the time of the foreclosure and sale: *Chadbourn & Co. v. Henderson.*

#### MANDAMUS.

1. The clerk of the Circuit Court is entitled to a mandamus against the Comptroller of the State, to compel him to issue a warrant to the clerk for his fees in the cases where land has been reported to the Circuit Court for condemnation and sale, for

taxes, regardless of the validity of the acts of the revenue collector, as the right of the clerk to his fees does not depend upon the validity of the acts of such collector: *Burch v. Akers*.

2. Where the Comptroller of the State refuses to issue to a Judge a warrant for the full amount of his salary, because a special Judge has been elected and supplied his place for a time, and that the statutory laws require the Comptroller to deduct the amount paid the special Judge from the salary of the regular Judge:

*Held*, that such statute was in conflict with the spirit of the Constitution with regard to the salaries of the Judges of the State, and that a peremptory mandamus issue to the Comptroller compelling him to issue the warrant for the full amount of the Judge's salary: *Burch, Comptroller v. Baxter*.<sup>1</sup>

#### NEW TRIAL.

If great hardship and injustice is the result of the improper exercise of discretion by the lower court, this Court will reverse, and grant a new trial: *Bank of Tennessee v. Officer et al.*

#### PARTNERSHIP.

1. Where goods are sold to a partnership firm, and the individual note of one of the members of the firm is taken for the debt, the presumption is that the vendor has elected to look to the individual member and not to the firm for his debt. But if the sale is made to the firm, and on its credit, then it will be treated as a firm debt. In this case there was no style or firm name under which the partners traded. They could bind themselves under any name if the credit was really given to and accepted by them: *Puckett v. Stokes*.

2. A person who participates in the profits of a business is not necessarily a partner as to the members of the firm or third persons. If so, all renters on shares would be partners of their landlords, which will hardly be contended for: *England v. England*.

3. A creditor of a partnership firm has no equitable lien upon its assets for the payment of their debt: *Hollins, Wright & Co. v. Staley*.

#### PARTITION.

Where one tenant in common files his petition, praying for the sale of two tracts of land, one containing forty acres, the other fifteen acres, that partition may be made, and the other tenants in common oppose the sale, and ask that their shares remain in common, and that petitioner's share be laid off to him, the court should order that petitioner's share be laid off to him in kind, and the shares of the others remain in common, unless it be made to appear that such an order would be injurious to the interest of the petitioner, and his share thus set apart, would bring less at sale than if the whole were sold together: *Read v. Tolbert et al.*

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<sup>1</sup> The Court conclude their opinion in this case with the following words: "It is suggested in the brief of the Attorney-General, that it is a delicate duty for the Judiciary to decide upon a question of this character against the Legislative Department and in favor of the Judicial Department. We admit it. But we are supposed to be independent, not of the law and Constitution, but of all such influences, either the one way or the other. We will act on this theory. We can not escape, if we would, a delicate duty, simply because it is a delicate duty. While fully conscious of our frailty, we will not suppose ourselves under any such influence. An act of the Legislative Department is entitled to our highest respect, and every proper presumption and intendment must be allowed in favor of the validity of their acts. We would not lightly disregard them, but it is our imperative duty to uphold the Constitution and declare when, in our opinion, the Legislature has exceeded the Constitutional restrictions, and, when this appears clearly, we must discharge this duty with as little hesitation as any other.

## PLEADING.

The Circuit Judge charged the jury that the averments of the declaration not denied by the pleas were admitted; that profert having been made of the note in the declaration, and its execution not denied under oath, that the plea of "*nil debet*" did not make such an issue as rendered it necessary for the plaintiff to produce the note on trial, although demanded by the defendant. Charge held to be erroneous, and cause reversed and remanded: *Jewett for use, etc. v. D. Graham*.

## PLEADING,—CHANCERY.

1. A bill filed for the purpose of recovering usury paid by the complainant, should, by its allegations, specify the amounts borrowed at different times and the usury paid thereon. But where the judgment creditor of the person who has paid the usury files the bill, this rule may be relaxed: *McFerrin v. Woods et al.*

2. A demurrer to an instrument filed in the Chancery Court, and called a Bill of Review, which contains matter upon which the Court would be authorized to grant relief as upon a petition for writ of error *coram nobis*, will be overruled, and the relief prayed for granted: *Bank of Tennessee v. Bellbury et al.*

## PRACTICE.

1. Under the act of 1819, and section 3901 of the Code, affidavits of lost instruments must be made before the court in which the cause is pending: *Jones v. Blackburn & Hathaway*.

2. If a Magistrate's warrant state the cause of action to be "a constable's receipt" on a re-trial of the cause in the Circuit Court, another and different cause of action can not be introduced and judgment had thereon: *Watkins v. Kittrell*.

## PRINCIPAL AND SURETY.

1. If the principal agree with his debtor that he will delay the collection of the debt for twelve months, provided the debtor will pay a part of the debt immediately, it is not such a contract for delay as to have the effect of releasing the surety on the note: *White & Howland v. Summers*.

2. Where a guardian gives two different bonds with different sureties for the faithful performance of his duties, and as security for the funds of his ward, such sureties on the different bonds will be liable to contribution to each other: *Odom et al. v. Odom et. al., Talley & Talley v. Fisher & Jetton*.

3. The property of the surety may be levied upon and sold by an officer, without having first exhausted the property of the principal, though the surety may have pointed out the property of the principal, but the officer does this at his peril, and will be responsible to the surety for any damages that may result from such action. Citing 7 Hum., 59, 11 Hum. 446, and 3 Head., 554: *Sellers v. Fite, Anderson & Green*. Freeman, J., dissenting.

4. The sureties or stayors of a debtor are not released from their liability by the execution of a deed of trust, and its acceptance by the creditors, where there is no stipulation in the deed for the suspension of the legal remedies of the creditors who have accepted of the benefits of the deed, though it suggest the time within which the trustee may pay the debts thus provided for. The acceptance of a mortgage or other collateral security by the creditor, without a stipulation for the suspension of his legal remedies for a certain fixed period, does not impair his rights against the surety or stayor, unless such mortgage is in such language as to make the inference of delay so strong as to be necessarily implied from the words of the instrument. Citing authorities: *Woods v. McFerrin*.

5. Where the surety procures a person to stay a judgment for the principal and himself, it is not necessary that his assent should be given to the stay as required by section 3061 of the Code. But the magistrate may grant the stay upon such evidence as satisfies him that the stayor has been procured by the surety or his assent given thereto: *Gaut v. White*.

#### REDEMPTION.

Where the purchaser at forced sale stated to the person entitled to redeem that the right of redemption would cease on such a day, and he acted upon such statement, and offered to redeem on that day, though he was prepared to redeem previous to that day:

*Held*, that he had the right to redeem on that day, even though it were after the expiration of the two years, as there was a mutual mistake as to when the time of redemption expired: *Pearson v. Douglas*.

#### REPLEVIN.

In replevin suits a demand of the possessor for the property is not necessary in order to give the plaintiff a right of action: *Draper v. Mosely*.

#### RESULTING TRUSTS.

1. A resulting trust arises only when the payment is made at the time of the purchase; any subsequent advance will not create such a trust. It is not indispensable that the person insisting on the resulting trust should have advanced money at the time, but if he transfer property or use his credit with the vendor, this will create the trust: *Sullivan v. Sullivan et al.*

2. If the husband reduce the property of his wife to possession, and re-invests it in real estate, and take the title in his own name, the mere fact that the wife's property paid for the land, does not create a resulting trust in her favor in the land so purchased; but if he obtained her consent to reduce her property to possession by a promise to re-invest for her benefit, then there might be a resulting trust in her favor: *Johnson v. Johnson et al.*

#### REVENUE COLLECTOR.

It is the duty of the Revenue Collector to make his report of delinquent taxpayers to the January term of the Circuit Court; but if the Clerk of the County Court fail to deliver to the collector the assessment books within the time prescribed by law, this will excuse the collector for not reporting to the January term, but he must comply with the provisions of the law in making his report in a reasonable time after the books are delivered to him by the Clerk of the County Court; otherwise he will be in default, and the State will be entitled to a judgment against him for the amount of uncollected taxes so reported by him: *The State v. Chadwell et al.*

#### SCIRE FACIAS.

Where land has been levied upon by an execution from a magistrate's court and judgment of condemnation by the Circuit Court, after which the plaintiff dies, there must be a revival of the judgment by *scire facias* before a writ of *venditioni exponas* can be properly issued: *Hewgly v. Johns*.

#### SHERIFFS.

1. A judgment on motion against a sheriff, taken at the November term, based upon a notice to the sheriff that at the March term such motion would be made,

but there being no court either at the March or July terms, the judgment was taken at the November term without further notice:

*Held*, that the judgment was taken without notice, and void: *Thomison et al. v. Douglass & Co.*

2. Where it is proved otherwise than by the clerk's certificate, that the sheriff of another county from that in which the judgment was had, received the execution, he is not entitled to notice of motion against him, for failure to return the execution as required by law: *Keith et al. v. Reese.*

#### TAX SALES.

It is essential to the validity of a tax deed that it show affirmatively on its face that the tax sale was made at the time and place required by law. If the recitals in it are that the sale was made on the day required by law, this would make it only *prima facie* evidence: *Thompson v. Lawrence.*

#### TAXATION.

The Clerk and Master of a court should report all money in his possession for taxation: *Riddle, C. & M., ex parte.*

#### TRESPASS.

Separate actions may be brought against each co-trespasser, and prosecuted to judgment. After which the plaintiff must elect which judgment he will enforce, and if the judgment so elected is satisfied, this concludes recovery on the other judgments except costs. But if the plaintiff fails, by execution, to realize the amount of the judgment so elected, then he has a right to resort to the other judgments to collect what remains unpaid on the judgment so elected: *Brisen & Co. v. Dougherty.*

#### USURY.

Where there is an annual payment of usurious interest and renewal of the note, and a judgment confessed on the last note executed, which does not include any of the usurious interest, by the party paying the usurious interest, without pleading as set-off the usurious interest already paid, but brings an independent action to recover the usury so paid, such confession of judgment will not bar him from a recovery in such action of the usury so paid: *Woods et al. v. Todd et al.*

#### WARRANTY.

Whether a sale is made upon sample, or upon the judgment of the purchaser, is a question of fact to be determined by the jury from all the surrounding circumstances: *Collier & Still v. Wassen, adm'r, & Lillard.*

#### WILLS.

1. Where the testatrix in one clause of her will devised the "balance of her estate to be equally divided among the heirs of her body," and in a subsequent clause provided that, "The portions going to my sons, I give to the heirs of their bodies, and hereby appoint each of my sons trustees, without bond, of his respective portions:"

*Held*, that the clause giving the absolute estate to the sons is annulled by the subsequent clause; that the sons hold simply as trustees of their children, who take the equitable estate *Pierce v. Ridley.*

2. In an issue of *devisavit vel non* as to a holographic will, it is for the jury to determine from all the surrounding circumstances, whether or not the deceased intended the paper writing to operate as a will. The fact that there was one attesting witness is not conclusive that the deceased intended to make it an attested will; or to strengthen the presumption that it was a holographic will: *Douglass et al. v. Hurkreader et al.*

3. The intention of the testator is to be gathered from the whole will, and independent clauses are to be construed by the light of the intention so gathered. A clause in a will or codicil published on the 2nd of January, 1862, as follows: "If any of my slaves I have left my four youngest children, each included, should die or become of no value before the first division takes place, their value is to be made up to them out of my estate undivided:"

*Held*, that this clause did not contemplate emancipation as one of the means by which the slaves were to become valueless: *Harrison and Wife v. Lytle et al.*

# RECENT AMERICAN DECISIONS.

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[SUPREME COURT OF TENNESSEE—DECEMBER TERM, 1873.]

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## EMINENT DOMAIN.

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*WHIDBEA WHITE et al. v. N. & N. W. R. R. CO. et al.*

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1. The Statutes of Tennessee giving State aid to railroads, and giving the State a lien upon the road-bed, fixtures and appointments of the road, do not confer upon the State any right paramount to that of the owner of the land from whom it has been taken without compensation and without his consent.
2. When the land of the citizen has been taken under the right of eminent domain for a railroad, without compensation and without his consent, and he has exhausted his remedy at law against said company—he may go into a Court of Equity and obtain an injunction against the further operation of said road over his land, until his damages are paid.

SNEED, J., delivered the opinion of the Court.

This cause involves the grave and important question whether a Court of Equity has the power to enjoin an incorporated railroad company from the use and operation of a portion of its road-bed, located on the land of a citizen without his consent, and whose title to the fee has never been extinguished by the payment of its assessed value—the “just compensation” guaranteed to him by the constitution. The Chancellor below decreed that the complainant’s debt be paid within ninety days—or in default thereof that the defendants be enjoined from the further use and occupation of so much of its road-bed as lies upon the land of the complainant. The defendants to the bill are the Nashville & North-western Railroad Company, the Nashville & Chattanooga Railroad Company and the State of Tennessee—the two latter have appealed.

The undisputed facts necessary to be considered are, that the Nashville & North-western Railroad Company was created a body corporate by the Act of 1852, ch. 74, for the purpose of establishing a line of railway communication between the city of Nashville and a point on the Mississippi river in the county of Obion. The charter provides that where any lands or rights of way may be required by the company for the purpose of constructing their road, and “for want of agreement” as to the value thereof, or from any other cause, the same can not be purchased from the owner or owners, the same may be taken at a valuation to be made by five commissioners or a majority of them, to be appointed by the Circuit Court of the county where some part of the land or the right of way is situated. After providing for the manner of assessment and the right of appeal thereupon to the Circuit Court and the re-valuation thereof by a jury, the charter provides that the lands or right of way so valued by the commissioners or jury shall vest in the said company in fee-simple as soon as the valuation may be paid, or when tendered may be refused, to the extent of two hundred feet wide. Where there may be an appeal, as aforesaid, from the valuation of the commissioners, by either of the parties, the same shall not prevent the work intended to be constructed from proceeding, but where the appeal is by the company requiring the surrender, they shall be at liberty to proceed with

their work, only on condition of giving the opposite party a bond with good security to be approved by the clerk of the court where the valuation is returned, in a penalty equal to double the said valuation and interest, in case the same be sustained; and in case it be reversed, for the payment of the valuation thereafter to be made by the jury and confirmed by the court: Provided, that when the land can not be had by gift or purchase, the operations of the work are not to be hindered or delayed during the pendency of any proceedings to assess its value as aforesaid, nor shall any injunction or *supersedeas* be awarded by any judge or court to delay the progress of said work: Acts 1852, ch. 74, § 23. The company thus incorporated proceeded to the location and construction of its road, much of which, including the portion located on complainant's land, has been completed, and for several years has been in operation. The land of the complainant was thus appropriated without his consent and without contract, in the year 1860, and on the 8th of March, 1861, he proceeded in the manner prescribed by the statutes to have his damages assessed, which were fixed by the commissioners at one thousand dollars. The case was brought by the company, by appeal, before the Circuit Court, when there was a verdict and judgment against the company for a like amount. The civil war and the consequent suspension of the courts having intervened, the case was not brought to trial and judgment in the Circuit Court until July, 1867. Upon taking its appeal from the action of the commissioners the company gave no bond as prescribed by the charter. An execution was issued upon the judgment and was returned the 21st of October, 1867, "no property found." The complainant is the undisputed owner of the land in question and has been in possession for more than thirty years. The valuation of the complainant's land, so appropriated and so assessed, and now in the possession of the defendants, has never been paid and the whole is still due to the complainant. The State of Tennessee, by an act of its Legislature of the 11th of February, 1852, entitled "An Act to establish a system of internal improvements," loaned its credit to divers railroad enterprises in the State, and among them to the defendant, by issuing its coupon bonds to an amount not exceeding eight thousand dollars per mile. These bonds were authorized to be issued to the several companies from time to time as prescribed in the act, as sections of said roads might be ready for the iron rails, upon the condition of payment by the companies of the semi-annual interest accrued, and the ultimate redemption of the bonds upon their maturity, and upon the further condition that the bonds when so issued should constitute a lien upon the property of the company in said section, including the road-bed, right of way, grading, bridges and masonry, upon all stock subscribed for in said company, and upon the iron rails, chairs, spikes and equipments, when purchased and delivered, and the State upon the issuance of the said bonds and by virtue of the same shall be invested with said lien or mortgage without a deed from the company for the payment by said company of said bonds and interest thereon, as the same becomes due. And upon default of any company so accepting the bonds, to meet the interest or to discharge the bonds when they fall due, a very summary remedy is prescribed for the indemnity of the State, through the intervention of a receiver, to be appointed by the Governor, to take charge of the road and all its appointments, to be operated or so disposed of as to save the State harmless. The defendant, under this act, received State aid to the amount of several millions of dollars. The first issuance of bonds so made to defendant was on the 23d of September, 1859, and the last on the 29th of July, 1868. And it is provided that when the whole of said road shall be completed, the State shall be invested with a lien without a deed from the company, upon the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chairs, and the whole super-

structure and equipments, and all the property owned by the company, as incident to or necessary for its business, and all depots and depot stations, for the payment of all said bonds issued to the company, as provided in this act, and for the interest accruing on said bonds: Act of 1852, ch. 151.

By sections 1122 and 1123 of the Code of Tennessee, it is provided that a railroad company owning any main line, may contract with any other company owning a railroad connecting with such main line, for the lease thereof, and that the lessee shall hold such road subject to the liens and liabilities to which it was subject in the hands of the lessor, and be bound for all payments for which the lessor was liable. And under the general statute regulating the assessment of damages for lands appropriated for public use, it is provided that no person or company shall enter upon such lands for the purpose of actually occupying the right of way until the damages assessed by the jury of inquest and the costs have been actually paid, or if an appeal has been taken, until the bond has been given to abide by the final judgment: Code, § 1346. If, however, such person or company has actually taken possession of such land, occupying it for the purpose of internal improvement, the owners may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided, or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds, and assess the damages as upon the trial of an appeal from the return of a jury of inquest: Code, § 1347. On the 30th September, 1867, the company then being very largely in arrears to the State on account of said bonds so issued, the road was seized by the State, a receiver appointed and the road thenceforth operated by the State until the 17th of July, 1868, when the Nashville & Chattanooga Railroad Company concluded a negotiation with the State, by which the said company leased the defendant's road upon terms acceptable to the State, and not necessary to be detailed. Among the stipulations of said lease was one that the Nashville & Chattanooga Railroad Company was in no event to be liable for any of the debts or liabilities of the Nashville & North-western Railroad Company. The former was operating the road of the latter under the said lease at the time of the filing of this bill, and hence was made a party defendant. The State became a party defendant upon her own petition, in which her rights and equities in the cause are fully set forth, and the grounds of which are indicated in the facts hereinbefore stated, and will be briefly referred to hereafter. The answer of the Nashville & North-western Railroad Company admits the case stated in the bill, but insists that complainant might have secured himself in the suit at law by requiring a bond of the company upon its appealing, and that at that stage of the case he might also have enjoined until the compensation was paid or secured, and that by his failure to do either, he has lost the remedy he now seeks, and that as he did not ask the injunction at that time and until the road was completed and in operation, it is now too late, as the rights of others have attached. That the courts will not grant an injunction restraining a company from operating its road, after it is in full possession and operation, and that an injunction will only be decreed to restrain it from taking possession of land illegally. The answer also recites the lease for the use of the State, of the Nashville & Chattanooga Railroad Company, and admits the insolvency of the respondent. The answer of the Nashville & Chattanooga Railroad Company relies upon the same defense, and insists that it is not operating the road in connection with the Nashville & North-western Railroad Company, but in subordination to, and for the benefit of, the State, which is its lessor; that it occupies the relation of an innocent purchaser, contractor or lessee for value without notice, and that it is the mere agent of the State and not subject to injunction. The Chancellor permitted the State to rely upon its petition

to be made a defendant, as an answer. The defense set up by the State is predicated upon its statutory mortgage given by the acts already referred to, and she insists upon the same defense stated in the answer of her co-defendant, that complainant has lost his remedy in equity by his laches at law, and that the State having a lien superior to all others that lien and the means of its discharge can not be interfered with or restrained by one of its own courts.

Under these complications, the question recurs, is the citizen utterly without remedy where his land has been seized without his consent, and appropriated without compensation. The solution of the question must depend mainly upon the equities presented on behalf of the State, and which grew out of her peculiar relation to the railroad companies which have received her bounty and have failed to discharge the obligations assumed in so doing. We do not assent to the proposition that the complainant has lost his remedy because he failed to demand security at law, or because he failed to invoke the injunctive powers of the courts when the defendant's road was about to be built over his land. The statute imposed upon the defendant in appealing the duty of giving bond. The words of the Act are that when the appeal is by the company requiring the surrender, they shall be at liberty to proceed with their works only on condition of their giving to the opposite party a bond with good security, to be approved by the clerk of the court where the valuation is returned, in a penalty equal to double the said valuation and interest, in case the same be sustained; and in case it be reversed, for the payment of the valuation thereafter to be made by the jury and confirmed by the court. The statute requires that reasonable notice shall be given the opposite party of this appeal. The provision is imperative and no such notice is shown. The giving of the bond is made the affirmative duty of the appellant, and does not depend upon the demand of the appellee. Hence, no waiver can be predicated upon his failure to demand it, and even had the bond been demanded and given, it does not follow that the constitutional right of the complainant to a just compensation would have thereby been assured. The securities might have followed the defendant and become insolvent, and his constitutional warrant for compensation still unsatisfied. It was the duty of the defendant to have given the bond, but the plaintiff was not bound to look to that bond for the security of his right to compensation. His bond of indemnity is written in the constitution itself, and so long as his property is unpaid for, he remains the victim of oppression and injustice. There were no means of compelling the defendant either to give the bond or abandon the land. The proviso to the section of the statute in question emasculates it of its remedial power. It is, that when the land can not be had by gift or purchase, the operations of the work are not to be hindered or delayed during the pendency of any proceeding to assess its value as aforesaid, nor shall any injunction or *supersedeas* be awarded by any judge or court to delay the progress of the work. The statute contradicts itself, but the proviso must be taken as conclusive of the legislative will. Where a proviso of a statute is directly repugnant to the purview of it, the proviso should stand and be held a repeal of the purview because it speaks the last intention of the law given: 1 Kent, 504; Potters' Dwarris, 118. If the proviso be directly contrary to the purview, the proviso is good and not the purview: *Townsend v. Brown*, 4 Zab., 80; *Rex v. Justices of Middlesex*, 2 B. & Adolph., 818. The constitutional provision is imperative that the complainant's land shall not be taken without compensation. He has not been paid, and he has been continuously litigating his right to such compensation ever since his property was taken. Under such circumstances he can not be held to a mere technical waiver, as he had no remedy by which he could regain the land that had been thus appropriated without his consent and against his will. A waiver is

the relinquishment or refusal to accept a right. The waiver of one of several remedies, or the waiver of a remedy as against one of several parties, does not extinguish the right. Thus it is said, a party in seeking a remedy may waive a part of his right and sue for another: 1 Chitty PL, 90. If the complainant had received the required notice of the intention of the defendant to appeal, and had in express terms waived the bond, believing as was the fact, that the defendant was then solvent, yet he stands securely on the constitutional guaranty, and unless we could ignore its imperative terms, his right can not be extinguished as against the defendant until compensation is made. Under the express terms of the defendant's charter, the title remains in the plaintiff until the valuation is paid or tendered. The injunction of the law was upon the defendant to give the bond. It was not left to the mere option of the complainant to demand it, but it was the defendant's duty at all events to give it. In failing to do so the defendant was guilty of a palpable violation of the law, and can not be heard to excuse his own wrong by imputing *laches* to the complainant.

We have before us then, the case of a citizen of Tennessee whose property has been taken without compensation by the government under the indisputable right of eminent domain, and given to an insolvent corporation against which he is utterly without remedy at law. He appeals to a Court of Equity for relief. He stands upon the great constitutional guaranty, that "no man's particular services shall be demanded, or property taken, or applied to the public use without the consent of his representatives, or without just compensation being made therefor:" Const. Tenn., art. 1, § 21. The right of eminent domain is inherent in every government. It is an essential attribute of sovereignty, without which government would be powerless in accomplishing the objects of its organization, which is to promote the general welfare of the people. The question what is a "public use" for which private property may be taken, is a political question to be determined by the State. It has come now to be universally conceded that a railroad enterprise for the use of the general public as a means of intercommunication, is a "public use" within the meaning of the constitution. The State had an undoubted right to take the complainant's land, or to authorize it to be taken and appropriated by defendant for the construction of its road. It is unnecessary to say more upon this subject than simply to reiterate these familiar and undisputed propositions. But the right of eminent domain is fettered by one obstinate condition, and that is, that the property taken must be paid for. This principle of indemnity is one of natural justice and is of very ancient origin. Thus, we are told that in ancient Rome such respect was paid to the right of private property that a scheme of the Censors to supply the city with water by means of an aqueduct, was defeated by the refusal of a proprietor to let it be carried through his lands, and afterwards it was decreed by the Senate that it should be lawful to take materials from the adjoining lands of citizens to repair public aqueducts, upon an estimate of the value or damages to be made by good men, and doing at the same time the least possible injury to the owners. When a private house was injured by a public aqueduct the Emperor paid the damages on petition to the Senate: 2 Kent, 411. Another instance is given, where the Sultan of Turkey being desirous of building and endowing a new mosque, selected a spot in Constantinople which was the property of several subjects. He treated with all of them for the purchase of their respective interests, and they all agreed except a Jew, who owned a small house on the place, and who refused to give it up. A great price was offered but he obstinately refused to sell. The Sultan consulted his judges, who answered that private property was sacred and the laws of the Prophet forbade his taking it absolutely, but he might compel the Jew to lease it to him as long as he pleased, at

a full rent. The Sultan submitted to the law: 2 Bay, 58. These examples afford evidence that the principle of indemnification is of great antiquity, and founded in natural justice. But it is the approved opinion that property in this and other States, when taken for public use need not be paid for before the taking. It is enough that the provision be made for the compensation afterward, provided the payment be absolutely certain: *Smith v. Helm*, 7 Barb., 416; 18 Wend., 667; *Anderson v. Turbeville*, 6 Cold., 151. The rule is, we think, well stated by Chancellor Walworth, that the compensation must be either ascertained and paid before the property is appropriated, or an appropriate remedy must be provided, and upon an adequate fund, whereby the owner may obtain his compensation through the medium of the courts of justice: 18 Wend. 9.

And Chancellor Kent held, that if the government proceeded without taking these steps, their agents and officers may and ought to be restrained by injunction. He granted an injunction in such case when acting as Chancellor, and in support of his opinion cited, it is said, the profoundest writers upon the civil law and the law of nature, and said that this limitation of the power existed before it was incorporated into our constitutions—was admitted by the soundest authority, and adopted by all temperate and civilized governments, from a deep and universal sense of justice: *Gardner v. Village of Newburgh*, 2 John. Ch., 162; Potter's Dwarrris, 392. This learned jurist was of opinion that in all such cases, the compensation, or offer of it, must precede or be concurrent with the seizure and entry upon private property taken under the authority of the State. But this court has held that it may be taken before compensation be actually paid, but only after certain provisions have been made for the payment: *Anderson v. Turbeville*, 6 Cold., 160. In that case it was held that, a person whose land has been taken for public use, without compensation, has a right to enjoin the taking and have it declared void unless compensation is paid or provided. That was a controversy about a street, but the court expressly reserves the question as to the application of the doctrine of that case to that of any railroads and the like, when the property is to be used for a franchise and is granted to such corporation: *Ib.*, 165. The effect of the right of eminent domain, said Johnson, J., in *Fletcher v. Peck*, amounts to nothing more than the power to oblige its citizens to sell and convey when the public necessities require it: 6 Cranch, 145. It is not claimed that the defendant has any title to the land in controversy here. The most that can be claimed by the appropriation is an inchoate right that may ripen into a perfect title upon payment of the price. So, it is held, that where the charter of a railway company provides that the title of land condemned for the use of the company shall vest in the company upon the payment of the amount of valuation, no title vests until such payment: *Balt. & Susq. R. R. Co. v. Nesbitt*, 10 How., 397. And it is held, that where the railway company enters into the possession of the land and constructs their road without having paid the whole of the damages assessed therefor, a court of equity will enforce the payment by an order of such payment within a time named, and in default will restrain the company by injunction from using the land until the price is paid: 1 Redf. Railways, 241; *Cozens v. Bognor Railway*, 12 Jur. N. S., 738; *Cushman v. Smith*, 34 Maine R., 247; 18 Wend., 9; Redf. Am. Railway Cases, 231, 233, 234; *Stacey v. Verm. Cent. Railway*, 27 Verm. R., 39. And so, it is said by this court, that "the people, in whom the sovereign power resides in this free country, were not willing to leave this dangerous though essential right of eminent domain, a power to deprive a man of his property without his consent, unguarded by barriers of a permanent nature, inserted in their constitution restrictions upon it. They impliedly delegate the right, but protect the citizen and secure to him the value of his private prop-

erty:" *Woodfolk v. N. & C. R. R. Co.*, 2 Swan, 431. We hold the proposition to be incontrovertible, that where the property of the citizen is to be taken and appropriated under the right of eminent domain, the statutes authorizing it must be strictly followed, and the condition of indemnification either made, or beyond all peradventure assured, becomes a precedent condition to the divestiture of the owner's right: *Cooley Const. Lim.*, 528. So, if a statute vests the title to lands appropriated in the State or a corporation on payment therefor being made, then it is plain that such payment is a condition precedent which must first be complied with: *Ib.*, *Stacey v. Verm. Cent. R. R. Co.* 27 Verm. R., 44. In that case the statute provided that where land was taken by a corporation for the use of their road, and the parties were unable to agree upon the price, and the same should be ascertained by commissioners, upon the payment or deposit thereof, the corporation should be deemed seized and possessed of the land. It was held that until the payment was made, the company had no right to enter upon the land to construct the road or exercise any act of ownership over it, and that a court of equity would enjoin them from exercising any such right. This case follows that of the *Balt. & Susq. R. R. Co. v. Nesbitt*, 10 How., 395, and *Bloodgood v. Mohawk and Hudson R. R. Co.*, 18 Wend., 10, where the statutory provisions are similar: *Cooley Const. Lim.*, 527. These citations sufficiently illustrate the uniformity of the rule as given by Chancellor Kent, that in all such cases, the statute that deprives the citizen of his property for a public use against his consent, must be strictly pursued. The charter of the defendant sanctions the entry and possession before payment, but expressly forbids a divestiture of the title until payment is actually made. But where it sanctions the entry and possession before indemnity, it is upon the assumption that there is an absolute guaranty of ultimate indemnity. It is stated as the settled and fundamental doctrine that government has no right to take private property for public purposes without giving a just compensation, and it seems to be necessarily implied that the indemnity should, in cases which admit of it, be previously and equitably ascertained, and be ready for payment concurrently in point of time with the actual exercise of the right of eminent domain. This point was well discussed in *Thompson v. Grand Gulf R. R. Co.*, 3 How. Miss., 240; and the decision was that compensation must precede the seizure: 2 Kent, 409. Such seemed to be the opinion of the learned commentator last cited. But upon this point the authorities are in conflict: *Vile 2 Serg. & Rawle*, 360; 20 Johns., 745; 6 Wend., 634. We have already seen, however, that in this State, the indemnity need not precede the seizure, provided the statute secures it beyond all contingency. And the best security guaranteed under defendant's charter, is, that the title in fee remains in the owner until the indemnity is paid. And this brings us at once to the question, what remedy remains to the owner in the event of the insolvency of the corporation, or its obstinate refusal to pay the indemnity after the seizure and appropriation of the land. The virtue of a judgment and execution at law has already been tested and found unavailing. The title is unquestionably in the complainant, but he could not bring ejectment because he is not entitled to the possession. The law has authorized the defendant to enter and construct its road, and it has done so, and is now operating it by itself or its assignees. The sanction that the law gives to the entry, would alike defeat the action of trespass. Where, then, is the complainant's remedy? His property has been taken without his consent. His right under the organic law to just compensation has been denied him, and he is absolutely without remedy in a court of law. But there is no wrong without a remedy. If a man has a right, he must, it was said in a celebrated case, have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it. It is a vain thing to imagine a right

without a remedy, for want of right and want of remedy are reciprocal. This principle is elementary, and without it human government is a failure: *Ashby v. White*, 2 Lord Raym., 953; *Winsmore v. Greenbank*, Willes, 577; *Brooms Max.*, 147. The complainant's remedy, if anywhere, must be found in the injunctive powers of a court of equity. After enumerating many of the instances in which this power will be exercised, a learned author observes, "it would be difficult indeed to enumerate them all, for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of a wrongful act of defendant a court of equity administers it by means of the writ of injunction:" *Eden. Inj.*, ch. 1; 1 *Madd. Ch. Pr.*, 106; 2 *Story Eq. Jur.*, § 872. Among the instances cited by the last named author is that where the right of possession and property is being injured, obstructed, or taken away illegally by a railroad company: 2 *Story Eq. Jur.*, § 929; *Bonaparte v. Camden & Appoy R. R. Co.*, 1 *Bald. R.*, 231. In the latter case, says Judge Story, the principle was strongly exemplified. The bill was brought to prevent the company from illegally appropriating the complainant's land. On this occasion, Mr. Justice Baldwin said: "The injury complained of as impending over his property, its permanent occupation and appropriation to a continuing public use, which requires the divestiture of his whole right, its transfer to the company in full property, and its inheritance to be destroyed as effectively as if he had never been its proprietor. If his rights of property are about to be destroyed without authority of law, or if lawless danger impends over them by persons acting under color of law—where the law gives them no power—or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission." In the same case: it was held, that although an act of the legislature appropriating private lands to public uses without compensation first being awarded, was not unconstitutional, yet a court of equity will issue an injunction against the actual possession of the lands until compensation is made: 1 *Bald. Cir. R.*, 226, 229; *Mohawk & Hudson R. R. Co. v. Archer*, 6 *Paige R.*, 83. If indeed, concludes Judge Story, courts of equity did not interfere in such cases, there would be a great failure of justice in the country: 2 *Story Eq. Jur.*, § 928. So, it was held in *Stewart v. Raymond et al.*, 7 *S. & M.*, 568. "If a railroad company neglect to pay the owner of land the damages awarded for the right of way, equity will enjoin them from using the land until the damages are paid: *Hill. on Inj.*, 500. And so in the case of *Cozens v. Bognor Rail.*, 12 *Jur. N. S.*, 727, already cited, it was held that where a railway company entered into the possession of the land and constructed their road without having paid the whole of the damages assessed therefor, a court of equity will enforce the payment within a time named, and in default will restrain the company by injunction from using the land until the price is paid: 1 *Redf. Rail.*, 241. And so in the case of *Perks v. Wycliffe R. Co.*, 3; 1 *Giff.*, 662, it is held that, if a company is in possession under a legal title, the court will not interfere at the suit of a person alleging an adverse title to restrain the company from continuing in possession; but if land has been taken by a company improperly, or if the conduct of the company has been vexatious, unreasonable or oppressive, the court may restrain them from continuing in possession until a proper compensation has been made: *Kerr Inj. Eq.*, 298. We think we may safely evoke from these authorities, as well as from the authority of sound reason and principle, an ample warrant for the opinion to which we are brought, that the complainant's remedy in this character of case has not been mistaken by his bill, if there be no other complication in the cause by which that remedy has been defeated. We have been referred to one or more English cases in

conflict with this current of American authorities, but we choose to follow our own, if for no other reason, because the right of the citizen here reposes upon an inviolable guaranty of the organic law, rather than the volatile breath of a mere act of Parliament, or the malleable doctrines of the English common law.

The case of *Deere v. Guest*, 13 Eng. Ch. Rep., 516, was a controversy about a private right of way, and for a private use for a tram-road connecting a limestone quarry with the Dowlais Iron Works, in which the right of way had been actually given by a tenant in possession. It rests upon different principles from those governing this case. The Lord Chancellor in that case disposed of the equities of the parties upon the ground that what was claimed by defendant was a mere right of way. If they are not entitled to that right, said the Lord Chancellor, then they are mere trespassers, and the plaintiffs have their proper legal remedy. We have seen that no such remedy exists here under the right of eminent domain, and when the statutory remedy fails, the injunctive powers of a Court of Equity become the *dernier resort* for the enforcement of the right to indemnity. And this brings us to the consideration of the last question presented upon the argument. And here it may be observed that if the State, as assumed, has suffered a great wrong to be done to one of its citizens and has connived at that wrong by an unlawful exercise of its prerogative right of eminent domain, and is here to claim a pecuniary benefit from it, then it becomes us to look well to what we are doing, that on the one hand the State shall suffer no disparagement, and on the other that the rights of the citizen shall be vindicated and rescued in a contest so unequal. We have been reminded in argument of certain axioms of the common law of England applicable to kingly power, and which never obtained in the jurisprudence of this country. It is not true that the State can do no wrong, and there can be no shadow of difference in moral obliquity between the *mala fides* of a man and the *punica fides* of a commonwealth. If such shadow there be, it must fall upon the latter, which in undertaking by stringent laws to enforce fair dealing among its citizens, should lift up a standard of morality for the people worthy of a sovereign. The State was not forced into this controversy, but having voluntarily entered it, she is entitled to no more consideration than the humblest of her citizens, and must abide by the mandate of her own laws. In becoming a common carrier or a corporator, or partner in a railway company, the State has sunk the rights and dignity of the sovereign to a level of those of the citizen, and in coming to litigate those rights in her courts, her controversy can be treated only as one between man and man: 8 Watts, 316; 9 Wheat, 904; 3 McCord, 377; 6 Ala. R., 814; 2 Pet., 323; 1 Sneed, 354; 3 Sneed, 381. It is assumed then on behalf of the State that she holds a statutory mortgage upon the road-bed, and all the appointments of the defendant's road, which takes precedence of all other demands. And it is contended that this lien when acquired by the issuance of the bonds, has priority over all other claims existing or to exist against said company. And such is the provision of the statute, which so far as it undertakes to destroy or impair existing contracts, is simply a nullity. But these bonds are to be issued as sections of the road may be ready for the iron rails, and it seems they were so issued in this case. When so issued they are to constitute a lien and mortgage without deed upon the section for which they are issued, from the moment of issuance, and if to every section the bonds are issued during the progress of the work, then the entire road is burdened with the lien—the mortgage upon each section dating from the issuance of bonds to that section. And among the conditions to their lawful issuance is one that the said section is not subject to any other lien whatever, and this must be made to appear to the Governor by the affidavit of the Chief Engineer and the President together, with the affidavit of a special engineer

appointed by the Governor himself: Act 1852, ch. 61. As we have already seen, the first bonds issued to the defendant upon the first section, were issued on the 23d of September, 1859, and the last on the 29th of July, 1868. When were the bonds issued for the section located over the complainant's land? When was the assumed lien upon this section acquired, if such a thing could be, as a mortgage upon property the mortgagor never had a title to? Was it before or after the complainant's litigation and judgment at law? The State has not shown when her supposed lien attached. Did the State go forward incautiously and issue the bonds for the section in question without demanding to know, as the statute requires, what other claims or demands were upon it? If not, did she have information that the complainant's land had been taken without compensation and that the insolvency of the defendant had thus far baffled all efforts at indemnity? These are pertinent questions, and a Court of Equity will regard with suspicion the absence of all affirmative proof upon this subject under the extraordinary circumstances of this case. But the statement of a simple and familiar principle of law dissipates this whole network of complication as to the overshadowing lien and demands of the State. The defendant could not mortgage what was not his own. The general principle is, that nothing is mortgageable unless it be the property of the mortgagor. The mere franchise, perhaps, of the defendant over the complainant's land was the subject of mortgage, and such a mortgage would pass the defendant's equity without derogation to the complainant's title in fee, and subject to indemnity therefor. Thus far, and no farther, could the State have acquired a lien. And this does not divest the fee. In the case of the *State v. Mexican Gulf Railway*, 3 Rob. La. Rep., 513, it is held that a railway where the soil upon which it is laid belongs to another, the owners not having been expropriated, is not susceptible of being mortgaged unless authorized by the Legislature, and that future property can never be the subject of conventional mortgage. And in the case of the *Borough of Easton's Appeal*, 47 Pa. S. Rep., 255, it was held that a mortgage by a corporation of their franchise property and effects, given after their entry upon lands and before judgment for damages, will bind their equitable interest therein, subject to the payment of the judgment for the purchase money. The defendant then in this case not having a mortgageable interest in the fee could make none to the State, nor could such a paramount lien have been acquired by the State upon the defendant's land until his constitutional right to just compensation had been discharged. The case of *Pierce v. Milwaukee & St. Paul Railway Company*, 1 Am. Rep., 203, to which we have been referred, bears but little analogy to this. In that case there had been a sale, and the contest was between the mortgage and the vendor's lien. In this, there has been a violation of the constitutional rights of the citizen whose property has been taken without his consent. He has no technical lien upon the property itself, but he stands upon the constitutional right to indemnity which can only be discharged in the manner required by the organic law, a payment of "just compensation." We hold in this case that the State has never acquired such a lien upon complainant's land as to divest or defeat his right to the just compensation secured to him by the organic law. The right of eminent domain lawfully exercised is entirely compatible with fair and honorable dealing in the sovereign. It gives no sanction to an act of robbery under the forms of law. The principles of this opinion have already indicated in the main the equities of the other defendants in this cause. It has been suggested that the Nashville & Chattanooga Railroad Company, pending this litigation, has become the purchaser of the Nashville & North-western Railroad. If this be true, this changed relation can in no way change or affect the liabilities of the parties, as the doctrine *lis pendens* fixes upon said company full notice of the

litigation, and all the equities of complainant in the cause. The defense of innocent purchaser or contractor, or lessee, as relied upon in the defendant's answer, can avail nothing. There can be no innocent purchaser from one not seized of the title: *Craig v. Leper*, 2 Yerger, 193.

We have given to this important cause that degree of consideration, investigation and thought which its magnitude demands, and we are brought to the conclusion that the equities of the cause are with the complainant. We have been admonished at the bar that the effect of the confirmation of the Chancellor's decree in this cause, will be to stop the United States mails, to check the impulse of industrial progress, to cut in twain an important line of trade and travel, and to bring upon the public and especially upon this commonwealth, trouble, inconvenience and misfortune. These are considerations which in a case like this, should not be pressed upon a tribunal of justice. There is neither magic nor terror in public policy, when it obstructs the path of constitutional right. A decree will be entered here against the Nashville & North-western Railroad Company for the complainant's debt, interest and costs, to be paid into the office of the clerk of this court, in ninety days from the final adjournment of the present term of this court, and in default thereof, the defendants to this bill, and all other persons, parties and corporations, will be enjoined and forbidden from the use, occupation and operation of so much of said Nashville & North-western Railroad as is located over the lands of the complainant, until his said "compensation" be paid.

## BOOK NOTICES.

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*A Treatise on the American Law of Easements and Servitudes.* By EMORY WASHBURN, LL. D. Third edition. Boston: Little, Brown & Co. 1873.

We have before us the above-mentioned work of that able author, who has in a former treatise given to the profession and to the country a fine exposition of that most abstruse and technical branch of the law, viz.: The Law of Real Property. The latter, owing to the vast field of matter to be gone over, and the number of subjects to be reviewed, is necessarily brief in the discussion of each particular branch, but, nevertheless, contains all the fundamental principles pertaining to the law of real estate, both corporeal and incorporeal. The learned author's recent book contains a full and comprehensive discussion in detail of one special branch of incorporeal property, viz.: Easements and Servitudes, and, after a somewhat cursory examination, we believe that, in the main, the law is correctly laid down.

One point, however, attracted our attention, in reference to which we beg leave to differ with the learned writer. On page 129, speaking of acquiring easements by prescription, he says: "What shall be taken to be a sufficiently *long period* of use, or enjoyment, to create a prescription or presumptive grant, in the modern use of the term, is understood to correspond with the local period of limitation for quieting titles to land. In England it is twenty years." He then proceeds to give the length of time required in the different States, and says: "In Georgia and Tennessee the period is seven years." It is true that the "local period of limitation for quieting titles to land" is, in this State, by section 2763 of the Code, act of 1819, chapter 28, seven years, but the party must have seven years adverse possession, "holding by conveyance, devise, grant, or other assurance of title," and such holding "without any claim by action at law or in equity commenced within that time, and effectually prosecuted against him, vests in him a good and indefeasible title in fee to the land described in his assurance of title." Here, it will be observed, the party must claim under an *assurance of title*, and so claiming adversely for seven years gives him an indefeasible title, but the question of how *long a period* of time is required to "create a prescription or prescriptive grant" either of land or of an easement, is not and can not be affected by this statute. In the case of *Lessee of Brock et al. v. Burchett*, 2 Swan, 27, the Court, per Totten, J., say: "We may observe that it is a well-settled rule of property, applicable to corporeal as well as incorporeal hereditaments, that a grant or other legal conveyance may be presumed, where a person claiming to be owner has been in the use and possession for a period of twenty years: *Hanes v. Pick's lessee*, M. & Y., 228; *Gilchrist v. McGee*, 9 Yerg., 457. This court has adopted the period of twenty years in conformity to English decisions, and it was adopted there in analogy to the Statute of Limitations: 21 J. 1, ch. 16."

In a very recent case, *Foster v. Plowman & Eve*, decided by the Arbitration Court the judgment of the court below was affirmed, and although no written opinion was delivered, yet the charge of Baxter, Circuit J., was very full upon the manner of acquiring easements, and he stated the law to be in accordance with the above-cited case in 2 Swan. In the light of these authorities, we conclude that the learned author is mistaken, at least as to the law in Tennessee.

The subject of easements is becoming of more importance in this country as the country itself grows older and more densely populated; and in proportion as men

increase and come more in contact with each other, so the opportunities for acquiring rights and for the infringements of rights increase; hence, in densely inhabited cities and thickly settled portions of the country, the law in reference to rights of way, dedication of ways to the public, rights of light and air, rights of property in mills, streams and water courses, becomes of the greatest importance.

We think that those subjects the author has treated exhaustively. His analysis of the cases presented is thorough and his style pointed. The law of incorporeal property is, in this country, comparatively in its infancy, and, without reflecting upon the learning and ability of the author we might say, with Lord Coke, "*Nihil simul inventum est et perfectum.*"

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*The Law of Remedies for Torts, including Real Actions, Pleading, Evidence, Damages.*

By FRANCIS HILLIARD. A second edition of 708 pages, not including the appendix of forms. Little, Brown & Co., Boston.

It is somewhat uncertain, if we were required to suggest an appropriate name, under what title we should classify this book. The author denominates it a "*work . . . designed to be a sequel . . . to another book,*" which explanation, he says, "*is necessary . . . to save the present treatise from the charge of being more desultory and disconnected than any legal text-book ought to be.*"

It does not pretend to be a commentary, though it is divided into books, chapters, and sections, with notes and cited cases. Neither has it the merit of a digest, though it is a mere citation of cases, for it lacks that peculiar and convenient arrangement which renders a good digest so invaluable to the practitioner. If we were to attempt to characterize it, we should say it is a collection and abstract of authorities upon the subjects mentioned at the heads of chapters.

The author tells us in his preface that the "*following pages might, without marked impropriety, have been scattered among the chapters of his former work,*" and require to be read in connection with the former before the question of their pertinency, utility, and methodical propriety can be fairly passed upon."

No one who reads them will gainsay this patent fact, while many will wish, doubtless, for their times' sake, not to mention other obvious considerations, that he had "*scattered*" them among the chapters of his "*former work.*"

The author has not, like Mr. Bishop, announced his purpose to write a "*series of legal books covering the entire field of our civil and criminal law,*" but he does exhibit an ambition to make a *few* "*legal books,*" in which he, like that author, finds opportunity for frequent reference to others, also the workmanship of his hands. And the advantage of this author in being able to refer to what he *has* done, in this work, is, in consideration of what both have accomplished, at least balanced by Mr. Bishop's in the agreeable expectation he assiduously cultivates by broadly hinting at what is yet to come.

Mr. Taylor, in his "*Landlord and Tenant,*" collects a number of decisions on one side of questions and a number on the other, and leaves the reader to evolve—from his own innate consciousness, perhaps—on which side the weight of authority rests: but Mr. Hilliard seems only to have endeavored to abstract from a considerable number of decisions upon certain subjects; he tells us, merely, that so and so has been *decided*. This is the plan of the "*work,*" and to those who desire a citation to mere judicial *ipse dixit*, and are indifferent to the principles relied on, or the logic of their discussion, it will, perhaps, prove of use; that is, if it happens to contain what they are looking for.

If "works" of this character find any general favor with the profession it will be as affording to that class above indicated a ready access to *something decided*, and will only have weight with a respectable judiciary in proportion as the authorities cited are found to be supported by precedent, principle and reason.

If what the profession need is not well-digested comments upon principles, with references to a few acknowledged leading cases, if the field for comment and discussion has been utterly exhausted, it may be worthy of consideration whether the general preference given by the profession to digests of decisions and volumes of selected cases, ought not to operate as a virtual injunction upon the preparation of works after this method. Unless the ability to cite a greater number of cases on one side than the other is become to be a question of merit in counsel, and which shall literally determine the weight of authority, then this conglomerate collocation of decisions can not meet the necessity which, it seems to be assumed, exists.

The fault of our American jurisprudence is, that we have too much and too latitudinal decision, and too little adherence to principle and precedent. At the rate at which we are now proceeding, it will soon come to be a lifetime-task for one to familiarize himself with the decisions of his own State, much less to glance at those piles, bound up in immemorial sheep, of the thirty-seven States of this Government.

And here we may remark, that the evil of separate State jurisprudence is in no way more pertinently exemplified than in this very opportunity for diversity and conflict, to say nothing of the excess of *authority* now so rapidly accumulating upon us.

But, if we must have volume upon volume of reports annually issued, let them contain only decisions upon new and unprecedented ~~decisions~~—and the field is surely ample and important enough to engage the zeal and gratify the ambition for more reports.

So, if we must have "works" on the law, its practice, pleadings, and the rules of evidence, let them show wherein old rules or principles have been innovated upon, overruled, or differently applied, and, along with this, a citation of the cases and a suggestion of the points of variance, etc. If new questions are adjudicated, let it be shown what they are, accompanied by something approaching a correct syllabus of the cases. It is not so much a question of ability to purchase books, but, rather, are they first-rate authorities, instead of mere volumes of adjudications.

The *tout ensemble* of the volume before us is in keeping with the fashion of the day in the book line, which gives wide margin and large type, upon the principle, doubtless, that the number of pages will increase in proportion as the quantity of matter on each decreases; and, it may be added, that some two hundred pages more "copious additions of recent cases," distinguish this from the first edition.

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*A Treatise on the Criminal Law of the United States.* BY FRANCIS WHARTON, LL. D.  
Seventh and revised edition. Kay, & Brother, 19 South Sixth Street, Philadelphia,  
For sale by W. T. Berry & Co., Nashville, Tenn.

The seventh and revised edition of this standard work is comprised in three royal volumes, covering nearly twenty-five hundred pages, substantially bound, thoroughly indexed, and printed in the very best style of the art. There is no treatise on this branch of the law in our language so critical, comprehensive and exhaustive. It covers the whole field of criminal jurisprudence. The third volume of this edition is made up almost entirely of new matter, to make room for which the author has re-arranged the topics, devoting the first volume to Principles, Pleading and Evi-

dence, the second to Crimes, and the third to Practice. The work contains a vigilant scrutiny, careful analysis, and copious citations of English and American decisions. But there is another feature of this new edition which we are pleased to see, and to which we call attention in the words of the learned author himself: "Recent investigations have shown that the chief maxims and definitions of the English criminal law were taken from the Roman and canon jurists. It might, therefore, be well argued that the reasoning of those jurists, when laying down such maxims and definitions, has the weight that belongs to the opinions of our own early courts when explaining their decisions; and it might be further claimed that the dissertations on such points of subsequent jurists, down to the present day, may be consulted with an advantage approaching to that derived from the study of commentators on the same topics who write in our own tongue. But even if this be not conceded, there are independent reasons why the task of appealing, as I do copiously in this edition, to those authorities, may not be without practical value to our own criminal jurisprudence. We are apt to forget that the same perfection which imperial Rome obtained in history, in poetry, and in oratory, it obtained in jurisprudence; and that the writings of the Roman jurists bear about the same relation to the distinctive and peculiar productions of mediæval English law, as do the Annals of Tacitus, the Satires of Juvenal, and the Speeches of Cicero, to the distinctive and peculiar productions of English mediæval literature. We are apt also to forget that so far as concerns questions of philosophical and comparative jurisprudence, the structure of our country as a federal republic, extending over half a continent, has much more in common with that of the cosmopolitanism of imperial Rome than it has with the particularism of mediæval England, limited to half an island."

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*Reports of Cases Argued and Determined in the Supreme Judicial Court of New Hampshire.* JOHN M. SHIRLEY, State Reporter. Vol. LII. Concord: Published by B. W. Sanborn & Co. 1873.

We are under obligations to the able Reporter for the present volume.

The New Hampshire Reports are of great value to the profession—of greater value than those of any other State, nay, of greater value than many modern text books or digests,—for the reason, that they contain not only the able and exhaustive opinions of the Supreme Court, but also the briefs of counsel, seemingly, in full. The present Supreme Bench of New Hampshire is a very able one, and appears not to be content with merely deciding points raised, but evidently aims so to decide them as to prevent their ever again being raised. Its opinions are marked with logical legal thought, and every position fortified by almost all the authorities possible to be collected. We know many of the profession prefer to have simply the conclusions to which a court comes without being informed of the reasons on which it bases them. And we partially share this feeling. It is, we must admit, at this day, when "authorities" are so much in demand and so much deferred to, especially refreshing now and then to light upon some old time, strong-brained thinker who speaks the law "as one having authority," and not as the scribe. But we are somewhat inclined to think that really the very best way to check this mania for citing authorities (many of them of no application whatever to the point in hand) is for the Supreme Tribunal of each State to adopt the course of the Supreme Court of New Hampshire, and attempt, in effect, to exhaust them. For instance, if the present system of reporting in that State is kept up the time must soon come

when her lawyers will not need the aid of text books or Reports of other States. In truth, we think the present volume before us would prove as serviceable to a lawyer of this, or any State, as any text book or even digest we could refer to. He would here find many of the most interesting questions of jurisprudence exhaustively discussed and explained, and other books referred to wherein he could, if he so wished, continue their more elaborate investigation. It combines the text book and the digest, and something more; for not only are the principles and conclusions of law stated, but the reasons upon which they are founded, and not merely ascribed to one case but traced through a long series of cases. The volume is about the ordinary size of State Reports, containing 661 pages. We notice, however, that although the type used is large and clear, yet the print has been so solidly arranged as to give to each page considerably more matter than to be found in similar works. Its typography and mechanical outfit can not be too highly praised.

The Reporter has added several quite valuable notes to different cases, and has displayed in every particular the correctest taste and most pains-taking care. The Index (one of the most important features to any character of book) is exceptionally excellent.

In the July and October numbers of this REVIEW for 1873, and the January number, 1874, we gave a digest of many of the opinions to be found in this volume, from proof-sheets kindly furnished by the Reporter, from which our readers have, perhaps, been enabled to judge for themselves of the number of interesting questions discussed and decided.

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*A Treatise on the Practice in Probate Courts in the Probate of Wills and Settlement of Estates, in the State of Illinois, with Forms of Wills, Codicils, Petitions, Orders, Reports, Settlements, and Clerks' Entries, used in County Courts in the administration of Estates.* By LEVI NORTH, Esq. Chicago: Callaghan & Co. 1873.

This admirable little book must prove of indispensable assistance to the profession in Illinois. Every State should have a similar one. Although especially intended for the profession in that State—we can yet see, from the glance we have taken through its pages, that it would also very greatly assist practitioners in other States. Every county judge, in this, and all the States in which no similar work has been published, should, by all means, secure a copy. We recommend the following lines to the thoughtful consideration of County Judges: "It is believed that in something less than every forty years—perhaps nearer each thirty years—all of the property of the country is subjected to administration. In this are involved the rights of widows, children, creditors and legatees, the protection of which depends upon the best knowledge, vigilance and integrity of judges, personal representatives and attorneys. If, therefore, measured by the amount of property involved, and the position of the parties interested in the settlement of estates, it will appear that the probate jurisdiction of County Courts is of much greater importance to the people than the civil jurisdiction of Circuit Courts. And what a responsibility does this devolve upon judges of County Courts." We coincide with the opinion that it is simply shameful for county judges to accept the office without a previous reasonable preparation for its duties, and an honest effort afterwards to fully understand and faithfully and intelligently discharge them, whether sufficiently compensated or not. No thoroughly honest man would accept or retain an office under other circumstances.

We find the work also of great practical assistance to the profession in other States than Illinois, for the reason that, although based upon the Illinois statutes and decisions, yet frequent references are made to the decisions of many of the States, and to text books, and because of the great similarity of the Statutes of all the States on Probate Practice.

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*The Law of Insurance, as applied to Fire, Life, Accident and Guarantee, and other non-maritime risks.* By JOHN WILDER MAY. Boston: Little, Brown & Co. 1873.

It is well known to the profession that we have many books relating to Insurance. Most of these are mere digests of conflicting decisions, in which the authors have merely copied the head-notes of the reporters, not giving enough of the facts of the cases to make a useful and practical book. This is an effort at a methodical arrangement of decided cases, blended with elementary discussions, showing the peculiar nature of a contract of insurance. The author has succeeded, in the discussion of adjudicated cases, in pointing out the principles of harmony or discordance which run through them as a whole, and where harmony was attainable has fused the cases to a unity and enunciated the principles of law. Many of the subjects discussed are new, and have not as yet been sufficiently elaborated to conclude that the law of such is settled. Whatever has been announced is here discussed, and the author has laid the foundation, from which the profession may safely and confidently advance, and upon which, we suspect, he proposes to build in the future.

In type and style the book reflects credit upon the well-known house of the publishers, and will, as it should, be eagerly sought for by the legal profession, and the officers of insurance companies.

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*California Citations: An Alphabetical Table of all the Cases cited in the Opinions of the California Reports, and of the California cases cited in the Reports of other States; with the points as to which they are cited approved, affirmed, criticised, doubted, denied, or overruled.* BY ROBERT DESTY. San Francisco: Sumner Whitney & Co. 1874.

The object of this work, to use the language of the author, is to show the value as authority in California of cases, both foreign and domestic, referred to by the Supreme Court of that State, and the extent to which California cases have been adopted or denied by the Supreme Courts of other States. A brief statement of the subjects discussed, and the point as to which each case has been cited is given, and the effect of the citation expressed in the words—approved, affirmed, cited, commented on, criticised, distinguished, disapproved, doubted, denied, followed, limited, modified, or overruled.

The volume contains 688 pages, and from this and the character of the work as sketched above the reader can judge of the great amount of labor that must necessarily have been bestowed upon it. As far as we are able to judge, from the examination given it, the author seems to have performed his work carefully and well. It must certainly prove of great value to the bar of California. It seems to us, however, that the value of a work of this kind could be very much enhanced by not only arranging the cases cited alphabetically, but also the heads of subjects passed upon or discussed. This could be made the subject-matter of a second volume.

*The New York Supreme Court Reports. Cases determined in the Supreme Court of New York from June to November, 1873.* Edited by ISAAC GRANT THOMPSON and ROBBLEY D. COOK. Vol. 1. Albany: John D. Parsons, Jr., Publisher. 1874.

We are informed by the publisher that these Reports will be issued in monthly parts, after the style of the English Law Reports, and each part will contain an index, table of cases reported, etc. A complete index, table of cases cited and reported, etc., will be furnished at the close of each volume. The present volume contains one hundred and seventy cases reported in full, and abstracts of thirty-nine others. Many of the cases will prove of quite general interest. Barbour's and Lansing's Reports having been discontinued, will be replaced by these, which promise, under the supervision of so well-known and able a lawyer as the editor of the Albany Law Journal, to fully meet the want they are intended to supply. The type used in this first volume is large and clear, and in every respect its mechanical outfit and execution is excellent. The price of these Reports will be \$5 per volume (bound), or \$15 per year, in monthly parts.

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*Cases argued and determined in the Circuit and District Courts of the United States, for the Seventh Judicial Circuit.* By JOSIAH H. BISSELL, of the Chicago bar, Official Reporter. Vol. 1—1851-1867. Chicago: Callaghan & Co. 1873.

This volume is the first of a series which is designed to include the leading decisions of the United States Circuit and District Courts for the Seventh Judicial Circuit since the time of McLean's Reports, and to form with them a continuous and harmonious series. Many of the decisions reported in this volume are accompanied by extensive notes of the reporter that add to them a greatly enhanced value. We know of no volume of Reports, of late years, in editorial execution so nearly perfect. The reader will remember that in the first number of this Review appeared two articles on the subject of the Powers of Municipal Corporations and their Officers, the first attempting to maintain the position that an officer of a municipal corporation could not bind the corporation without ordinance, where the charter specifies *that* as the mode in which the corporate power should be exercised; and, also, that every person dealing with such officer or becoming the holder of negotiable securities purporting to be issued by the corporation must, at his peril, see to the authority under which the officer acts or the paper is issued; the second seeking to establish a contrary view. In the volume now before us the learned reporter has, in two notes, one following the case of *Clarke v. City of Janesville*, 98, the other that of *Mygatt v. City of Green Bay*, 292, collected many of the authorities on this interesting question, which we append that the reader may judge for himself of the value of a series of Reports edited as these. In his note to the first of the above-mentioned cases the Reporter states that "all persons must inquire into the power of corporations to make contracts and authority of its officers," and cites the following cases: *Hodges v. Buffalo*, 2 Denio, 110; *Taft v. Pittsford*, 28 Vt., 286; *Leavenworth v. Rankin*, 2 Kansas, 357; *Baltimore v. Reynolds*, 20 Md., 1; *Wallace v. San Jose*, 29 Cal., 180; *State of Maryland v. Kirkley*, 29 Md., 85, 111; *State v. Haskell*, 20 Iowa, 276; *Bridgeport v. Railroad Co.*, 15 Conn., 475; *Baltimore v. Eschbach*, 18 Md., 276; *Dill v. Inhabitants of Wareham*, 7 Metc., 438; consult *Mygatt v. City of Green Bay*, *post* p. 292; *Gordgen v. Supervisors of Manlove County* June Term, 1870, to appear hereafter in this series; and for a full citation of authorities on the question of municipal bonds, see *Schenck v. Supervisors of Marshall County*, Oct. Term, 1866, to appear in subsequent volume of these reports."

To the case of *Mygatt v. City of Green Bay*, the learned Reporter adds this note: "The holder of coupon bonds payable to bearer, but referring to act under which they were issued, is chargeable with knowledge of its provisions, and the construction to be placed upon them by the courts: *Commonwealth v. Chesapeake, etc., Canal Co.*, 32 Md., 501. County bonds payable absolutely to bearer are good in hands of *bona fide* holder, although restrictions in statute have been disregarded: *Wood v. Alleghany Co.*, 3 Wallace Jr., 267; *San Antonio v. Lane*, 32 Texas, 405. Want of power to issue bonds is a good defense, even against a *bona fide* holder: *Treadwell v. Commissioners, etc.*, 11 Ohio State, 183; *Mercer Co. v. Hackett*, 1 Wallace, 83; *Starin v. Genou*, 23 N. Y., 439; *Marsh v. Fulton Co.*, 10 Wallace, 676; *Aspinwall v. Commissioners of Daviess County*, 22 How., 364; *Gould v. Town of Sterling*, 23 N. Y., 456; *Hill v. Manchester Water-works Co.*, 5 Barn. & A., 866; *Aurora v. West*, 22 Ind., 88; *Marshall Co. v. Cook*, 38 Ill., 44; *Clay v. Co.*, 4 Bush, 154," etc.

The reader must really get the volume if he wishes to pursue this note further—our hand is cramped already with copying what little of it we have written. Just here we would like to throw out a general remark—intended for everybody: What an immense deal of labor and trouble the Reporter must have been put to in ferreting out and examining all the authorities quoted in the notes above referred to! And how easily it could all have been saved to him had he but sent to us for that number of the REVIEW containing the articles on Powers of Municipal Corporations, etc., in which all these authorities are collected and carefully examined!

We recommend this volume to the profession as in every respect indispensable to a practitioner's library.

*Railway Law in Illinois. The Relation of Railroads to the People, as set forth in the Constitution, the Statutes and the Decisions of Illinois, together with the Decisions of other States and the Federal Courts upon the Constitutional Questions Involved.* With an introduction by Hon. JOHN M. PALMER, and an Appendix showing the condition of all the Railways in the State, and the Tariff Schedule prepared in accordance with Law. By FRANK GILBERT. Chicago: Callaghan & Co. 1873.

We have read with much interest this little treatise of 331 pages, and commend it heartily to the profession. It is not a loosely-jointed patchwork of legislative and judicial enunciations, but a carefully considered and solid work. The only blemish we have been able to find is the Index, which is not at all complete, and evidently carelessly prepared. We place quite as much stress as Mr. Carlyle upon the almost absolute indispensability of a full Index to every book worth the reading. We feel also inclined to say that the Introduction, in our opinion, adds no value to the volume.

WE are indebted to the kindness of Hon. C. C. Cole for a copy of the 7th vol. of the *Western Jurist*, a Monthly Law Magazine, published at Des Moines, Iowa, by Mills & Co. The present volume contains 722 pages of admirably selected matter. The *Jurist* has a large and able editorial corps, who keep their readers well supplied with all the latest legal news. It deserves to be liberally sustained, and we doubt not but that it is. Nos. I. and II. of "English and French Law," reprinted from the *SOUTHERN LAW REVIEW*, appear in this volume.

*The Central Law Journal.* St. Louis, Mo. Hon. JOHN F. DILLON, Editor, S. D. THOMPSON, Associate Editor. Published by Soule, Thomas & Wentworth, St. Louis. Subscription price, \$3 per year. Name and address in legal directory column, \$5 per year, in advance.

We take pleasure in welcoming this new weekly to our exchange list. The numbers thus far indicate a successful future, for the editorial management displayed in the treatment of subjects and cases discussed, and in the selection of matter, shows a correct and clear realization of the precise want such a publication as this should endeavor to supply. The editorial notes are pithy and suggestive—rarely over a column in length. Each number contains notes of recent American decisions. Nos. 5, 7 and 8 contained each a carefully selected digest of unreported decisions of the Supreme Court of this State, delivered at Jackson, September Term, 1873. This feature, if continued, ought of itself to attract to the Central Law Journal a strong support from the Tennessee Bar. Several of the decisions at Jackson, also, have been published in full. We believe that digests of recent unreported decisions of the Supreme Courts of several of the States have been published, and add great value to its other features, and general worth and usefulness. Important opinions of the United States Circuit and District Judges, that otherwise would, perhaps, be lost to the profession, are preserved in its pages.

The paper and type used, and the manner in which the matter is arranged and displayed, are excellent. The Journal has our heartiest wishes for its enduring success.

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*Beard's United States Circuit Court Reports.* Vols. 2 and 3. Chicago: Callaghan & Co.

We are under obligations to the learned Reporter for advance sheets from the above volumes. We had expected in this number of the REVIEW to give the head-notes of many of the decisions contained in them, but our space has precluded us. We give, however, the syllabus to the case of *Evansville Nat. Bank v. Metropolitan Bank*, to be reported in 2d volume, p. 527.

"1. A transfer of stock in a banking corporation organized under the act of June 3, 1864, to a *bona fide* holder is valid, though the seller, or pledgor, be at the time indebted to the bank, and a by-law of the bank declared that no transfer of the stock by any share-holder indebted to the bank should be made, without the consent of the Board of Directors.

2. Such a by-law in effect attempts to create a lien upon stock for debts of the holder, and the result is the same, as if a loan were made upon the security of the stock—a transaction forbidden by the 35th section of the act.

3. The principle announced in the case of the *First National Bank of South Bend v. Lanier* is decisive of this case."<sup>1</sup>

We trust we will be able to give in our next number further quotations from these volumes.

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<sup>1</sup> To this case the learned Reporter appends the following note.

A corporation has no lien at common law upon stock for a claim against the stockholder: *Steamship Dock Co. v. Heron*, 52 Pennsylvania, 280; *Massachusetts Iron Co. v. Hooper*, 7 Cushing, 183.

Nor any implied lien; and is bound to enter on its books a transfer of the stock made by the holder: *Heart v. State Bank*, 2 Devereux's Equity R., 111; *Contra, Mechanics' Bank v. New York & New Haven R. R. Co.*, 13 New York, 599; *Arnold v. Suffolk Bank*, 27 Barbour, 424.

*Cooley's Blackstone.* Second edition. Revised. Chicago: Callaghan & Co. 1872.

This is the second edition of Blackstone's Commentaries, edited by Thomas M. Cooley, Jay-professor of Law in the University of Michigan, and well known to the profession as the author of a work on Constitutional Limitations. This edition, as the editor tells us, differs from the first in the addition of a few notes and citations of late authorities. The demand for a second edition of this book so soon after the publication of the first, shows in what estimation it is held as a text-book for students of the law. Its favorable reception can not be entirely attributed to the fact of its being the latest edition of Blackstone, and therefore showing the most recent changes in the law; but it commends itself to its readers by reason of its intrinsic worth, by its thorough, comprehensive and judicious treatment of the subjects to which the notes apply.

Of course, within the limits of a review, it would hardly be pertinent to the subject to attempt any examination into Blackstone's merits as a text writer. Whether upon the one hand his Commentaries deserve the high praise bestowed upon them by Lord Mansfield, Sir Wm. Jones, Ch. Kent, and others, or merit the unqualified condemnation given by Mr. Ritso, Mr. Austin and others, we can not now discuss. Perhaps the correct estimate lies somewhere between the two opposing views. It may be his critics have leaned too far in one direction or the other, by reason of applying different and not altogether correct standards by which to judge him; the one side, looking at the facilities for acquiring a knowledge of English law before the delivery of these lectures, namely, by a recourse to a mass of reports and statutes, and the harsh and uninviting pages of Coke upon Littleton, find in Blackstone by contrast a model law writer, who "put a polish upon that rugged science and cleansed her from the dust and cobwebs of the office;" the other side, looking upon law as a theoretical science, whose object is the exposition of principles of abstract justice rather than

Lien may be sustained by proper clause in certificate of stock: *Vansands v. Middlesex County Bank*, 26 Connecticut, 144; *Fitzhugh v. Bank of Shepherdsville*, 3 T. B. Monroe, 126.

Or by provision in charter: *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Missouri, 149; *Cunningham v. Alabama Life Ins. and Trust Co.*, 4 Alabama, N. S., 652; *Stebbens v. Phoenix Fire Ins. Co.*, 3 Paige, 370; *Union Bank v. Laird*, 2 Wheaton, 890; *Mechanics' Bank v. Merchants' Bank*, 45 Missouri, 513. See also *McCready v. Rumsey*, 6 Duer, 574; *Merrill v. Call*, 15 Maine, 428.

Where a bank has notice of an equitable transfer, not completed on its books, it is bound to respect it: *Conant v. Seneca County Bank*, 1 Ohio State, 299; *Nesmith v. Washington County Bank*, 6 Pickering, 324.

Lien given by charter can not overreach a prior assignment so as to prevent its transfer: *Neale v. Janney*, 2 Cranch, C. C., 188.

Bank may hold the whole of its debtor's stock: *Sewall v. Lancaster Bank*, 17 Sergeant & Rawle, 285.

And dividends on such stock: *Hague v. Domdeser*, 2 Exchequer, 741.

Assignee takes subject to the rights of the corporation under its charter, of which he is bound to take notice: *Reese v. Bank of Commerce*, 18 Maryland, 272; *Brent v. Bank of Washington*, 10 Peters, 610; *Union Bank of Georgetown v. Laird*, 2 Wheaton, 890.

Lien is good as against purchaser at sheriff's sale, with notice: *Tuttle v. Walton*, 1 Georgia, 4.

The Supreme Court of New York held that under these acts of Congress a bank can not by a by-law create a lien upon stock for the security of debts due from the stockholder to the bank: *Rosenback v. Salt Springs National Bank*, 53 Barbour, 495; followed at a subsequent term in *Conklin et al., Assignee, &c., v. Second National Bank, Ib.*, 512.

*Contra:* In all of the earliest cases under the Bankrupt law, Blatchford, J., ruled that a bank could maintain a lien on its shares of stock, as against the assignee in bankruptcy of the stockholder, to protect itself against loss: *In re Bigelow*, 1 Bankrupt Register, 202.

Though a certificate of stock contains a provision that the stock was not transferable until all the liabilities of the stockholders were paid, such a provision gives the bank no lien upon the stock for subsequent indebtedness, and is void under the act of Congress of June 3d, 1864: *Conklin v. Second National Bank of Oswego*, 45 New York, 655.

the practical administration of right between man and man, condemn his writings as superficial and inaccurate. Whatever may be the correct view, the fact is undoubted that these Commentaries have for more than a century occupied a foremost place among law books, both in England and this country.

The judgment to be passed upon the work of an editor of Blackstone at the present time must be formed upon the idea that this book is intended for the use, we might say the exclusive use, of students first entering upon the study of the law, so that the editor's labors will be appreciated in proportion to the assistance afforded the student in mastering the work before him.

The object to be attained in an American edition of Blackstone is to note the changes in the law of the text and its condition at the time the notes are made. As to how far the changes in the laws of England should be set forth, of course depends entirely on the judgment and discretion of the editor. Much of the matter treated of in the text has either become obsolete or pertains exclusively to the local laws and civil government of England. Upon these subjects, however, there has accumulated in former editions a mass of notes from the pens of Chitty, Christian, Coleridge and other English annotators, most valuable for the purpose intended, but of little service to an American student of the common law. These notes the editor has cut down with an unsparing hand, in some cases rejecting them entirely, and in others bringing them within a small compass; indeed, throughout the whole work he has presented the views of former English editors in a compressed form, often giving the substance without reproducing the exact language. His labors, however, on the subjects above referred to have not been confined to collating and sifting the English notes, but have produced original notes, instructive and interesting. The points of resemblance and difference in the constitutions and government of England and the United States are pointed out clearly and succinctly; *e. g.*, the powers of the legislative bodies, B. I. p. 49, the composition of the cabinet, *Ib.*, pp. 228-231, the treaty-making power, *Ib.*, p. 256, etc. On page 22 will be found an interesting note on the Inns of Court in London, the examinations of students for admission to the bar, and the qualifications required of applicants.

One of the chief merits of Blackstone's Commentaries is, that they present the general principles of the common law in a clear and compact form without too great elaborateness of detail; the notes, therefore, in elucidation of the text will be valuable in so far as they tend to accomplish the same purpose. To the student of any science, eager to learn, the great drawback often is that the approach to it is made too abrupt, and unless the path is in some way smoothed for him, the immensity of the work to be accomplished will be brought too vividly to his mind. In no other branch of learning is this more often exemplified than in the study of the law; founded upon rules, some of which find their source in natural justice and reason, others to the last degree artificial and technical, and others again formed in reference to the condition of a particular people or State, it is not to be wondered at that many find their first initiation into its mysteries too often a groping in the dark. To afford the necessary assistance in such a case would seem to be as difficult as it is meritorious. It is comparatively an easy task for a man of legal information and learning to write a book for practising lawyers, it is not so easy to instruct one unlearned in the law what and how to study. The editor in the book before us, shows that he has appreciated the importance of the work to be done and the manner in which it should be done. His notes are pertinent to the subject-matter discussed in the text, and state the propositions intelligibly, without diffuseness. The principles of law are laid down distinctly and correctly, followed by references to authorities. A generalization from the decisions is given, without reciting the facts of particular cases or opinions of the

courts, a practice greatly to be commended in a book of this kind. Only those principles of law are given which are generally regarded as well settled; no lengthy discussion is made of questions upon which the authorities are conflicting, a course tending more to weary and disgust than assist the student. In regard to that part of the law of the text which is in a transition state, but not yet definitely determined by statute or decisions of courts in all the States, the general tendency of the change in progress is stated without entering into details.

As a preface, the editor has given some "Suggestions for the Study of the Law," well worth the student's careful perusal. Its object is, "First, to impress upon the mind of the young gentleman about to enter this noble but very laborious profession, the importance of thoroughly mastering the rudiments of the law before he undertakes to assist in its administration; and, second, to give him a few hints that shall induce him to employ properly his reason and reflection, and not make useless expenditure of time and energies in his pursuit of legal attainments."

On the whole we consider this one of the best, if not the best, of the editions of Blackstone's Commentaries.

At the present time, when the legal profession is beginning to feel the influence of that nervous activity and impatience of laborious preparation for the duties of life so characteristic of the age, it is well that the attention of one about to begin the study of law should be called to the importance of laying the foundations deep and broad, by the study of the elementary writers. And although the way may seem to him long and wearisome, yet it is the path marked out and traveled by all who have become truly great in the profession. "Let it be his encouragement and consolation that, by the same means, the same end can be reached. It is but for him to give his days and nights, with a sincere and constant vigor, to the labors of the great masters of his own profession, and although he may now be but a humble worshipper at the entrance of the porch, he may hereafter entitle himself to a high place in the ministrations at the altars of the sanctuary of Justice:" Judge Story, 2 Eq. Jur., 1000.

*A Treatise on the Law of Judicial and Execution Sales.* By DAVID RORER, of the Iowa Bar. Chicago, Ill.: Callaghan & Co., Publishers.

The above is the title of a work published recently by Callaghan & Co., of Chicago, and is upon a subject of great importance to the profession. It treats, as its title imports, of sales made under the decrees of a Court of Equity, and of sales made by the sheriff under executions from a Court of Law. Every lawyer knows how often questions arise out of these sales, and yet we do not recall at this moment, any other treatise upon the same subject. We have not had the time to look into and examine this work so as to be able to speak of the fullness and ability with which the subject has been treated by the author, but we have no doubt that it will be found to be of use as a book of reference and of great help to the practitioner.

We are indebted to Hon. R. A. Hill, of Oxford, Miss., for copies of several interesting opinions delivered by him in the District Court of the United States for the Southern District of Miss., which reached us too late for insertion or notice in the present number.

*Bispham's Principles of Equity. A Treatise on the System of Justice administered in the Courts of Chancery.* By GEO. TUCKER BISPHAM, Esq., of Philadelphia. One Vol., 8vo.: Kay & Brother, Publishers, Philadelphia.

He who touches his pen to subjects that have been refined and embellished by Kent, Story and Walworth, is a bold writer. His performance may upbraid him at every point for temerity. At the outset he is an object of suspicion. While assuming jurisdiction to render judgment on this new treatise, we discard the analogy of legal presumptions, and do not esteem a writer of law literature innocent of errors until the contrary appear. For the most part, book makers may be adjudged guilty until they establish the contrary. The examination of the treatise we now propose to mention was commenced with the above unpropitious sentiment; but happily the merits of the book incline us to find in its favor.

Prior to Mr. Justice Story's Commentaries on Equity, no work had appeared, which in arrangement, style and course of reasoning, was adapted to the wants of an American student of elementary equity doctrines. Since then have followed several valuable English works, especially the able treatise of Mr. Spence, but none which in this country may impair in the slightest the excellence of the illustrious American jurist.

Mr. Bispham's treatise is more compendious, more analytical, and more perspicuous in style than Story's Commentaries. Looking at the two works side by side, we can see no reason why the former should be abashed in the presence of its celebrated predecessor. Both contain, by way of introduction, a discussion of what equity is in the view of a Court of Chancery, together with a short account of its origin and history, to which is added a brief account of its establishment in the United States. Mr. Bispham's treatment of these topics is without that extensive scholarly research which characterizes the distinguished author of the commentaries.

The next part of the subject of which our author treats is an admirable introduction to the body of his work. He presents a clear, rational analysis of the circle of equity topics treated in the after pages. The arrangement and classification are based substantially upon the plan of Spence's Equity, which for a regular course of study or reading, has the advantage of Story's Commentaries. The division of the subject is into: I, Equitable Titles; II, Equitable Rights; III, Equitable Remedies. Under the first division fall the various classes of trusts, express trusts, implied trusts, trusts for married women, trusts for charities, mortgages, assignments, etc. As an example of the author's mode of stating his doctrines we quote the following paragraph:

"Trusts by implication of law may arise either for the purpose of carrying out the presumed intention of the parties, or they may be entirely independent of, or contrary to, intention. Trusts of the first-class are said to result by operation or presumption of law from certain acts or relations of parties from which an intention to create a trust is supposed to exist, and they are, therefore, called *Resulting or Presumptive* trusts. Trusts of the second-class exist purely by construction of law, without any actual or supposed intention that a trust should be created, but merely for the purpose of asserting rights of parties, or of frustrating fraud. They are therefore, termed *Constructive* trusts.

Resulting trusts may arise in several ways, and may be conveniently divided into the following classes: First, where a purchaser pays the purchase money, but takes the title in the name of another; secondly, where a trustee or other fiduciary buys property in his own name, but with trust funds; thirdly, where the trusts of a conveyance are not declared, or are only partially declared, or fail; and, fourthly, where a conveyance is made without any consideration, and it appears from circumstances that the grantee was not intended to take beneficially."

Under the second great division, that of Equitable Rights, fall accident, embracing chiefly lost instruments, defective execution of powers, penalties and forfeitures; mistake; fraud, out of which grows the doctrine of notice, estoppel and election;

conversion; adjustment, which includes set-off, contribution, exoneration, subrogation and marshalling; and lastly, liens, existing independent of possession.

Under the third great division, that of Equitable Remedies, fall specific performance; injunction, which is used to protect, first, equitable rights; and, second, legal rights, such as waste, trespass, nuisance, patent rights, copy rights, etc.; reformation, rescission and cancellation; account, dower, partition, boundaries and rent; partnership; creditors' bills, and bills *quia timet*, for receivers, *ne exeat*, *supplicavit*. Under *quia timet*, fall bills to remove a cloud. The jurisdiction of infants, idiots, etc., result from the prerogative of the crown as *parens patriae*, acquired in America both by general jurisdiction and statutes.

The style in which the book is written is plain, concise, and perspicuous. The meaning of the author is rarely clouded by an ill-chosen expression.

The citations of the author appear to be generally from the late reports, among which is a liberal proportion of Tennessee cases, including a few as late as Second Heiskell's Reports. Free use is made of several modern text-books and special treatises. Very scant reference is made to Mr. Justice Story, which may be accounted for partly by a desire, perhaps, to avoid seeming merely to follow in the wake of that distinguished jurist; and partly because the plan of the work—seeking to embody only the ancient decisions wherein the principles of equity have had their early development, together with the most recent decisions wherein those principles are applied—renders it quite unnecessary to draw to any considerable extent from Story's Commentaries. A perusal of this new work has afforded us much pleasure. It will serve to revive the knowledge of the old practitioner, and to the student will prove a valuable manual of the principles which constitute the substratum of Chancery Jurisprudence.

*A Treatise on the Law of Injunctions, as administered in the Courts of the United States and England.* By JAMES L. HIGH, Counselor at Law. Chicago: Callaghan & Co. 1873.

We have in our practice had occasion several times to consult the new work on Injunctions by Mr. High. We have found it well arranged, and the cases cited to support the text well digested and intelligently analyzed. It is peculiarly full in its reference to American authorities. We can, therefore, recommend it as a reliable, able and full treatise upon this important branch of law.

## NOTES.

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|--------------------------------------|---|
| 1. CHANCELLOR COOPER.                | 10. CAPITAL PUNISHMENT,                   |
| 2. DANIEL ON NEGOTIABLE INSTRUMENTS. | 11. DANIEL LORD, JR.                      |
| 3. THE DUTY OF AN ADVOCATE.          | 12. AN IRISH COURT.                       |
| 4. JURIES.                           | 13. TIMIDITY IN YOUNG ADVOCATES.          |
| 5. LOUISIANA.                        | 14. LAWYER AND CLIENT.                    |
| 6. STAY LAWS.                        | 15. LONDON LAW AND LAWYERS.               |
| 7. USURY.                            | 16. NEW YORK CITY LAWYERS.                |
| 8. LEGAL RESTRAINTS.                 | 17. ORIGIN AND HISTORY OF 'LEGAL MEMORY.' |
| 9. GIFTS INTER VIVOS.                | 18. THE TICHBORNE TRIAL.                  |
|                                      | 19. TO SUBSCRIBERS.                       |
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### CHANCELLOR COOPER.

On the 29th of last November a year ago, Chancellor Cooper commenced the duties of his high office. At the unanimous request of the members of the Nashville Bar, the Governor had appointed him to fill the unexpired term occasioned by the resignation of Chancellor East. From 1865 to 1873—be it said with all respect to the learning and strict sense of duty of the many eminent lawyers who between those years administered equity to hungry suitors from its wool-sack—the Chancery Court of this district had gradually grown into a most striking family resemblance to that ancient progenitor, of Lincoln's Inn Hall, so terribly portrayed in Bleak House. There was "fog up the river, fog down the river, fog everywhere." Its practice and system of pleading, by long disuse, had become almost obsolete, and the effect of this was not only seen and felt in the too frequent outrages done upon the legal rights of its suitors, but also was of most baneful influence upon the education of the young votaries of equity jurisprudence who thronged its halls. This criticism, however, would be quite unjust were it not here mentioned, that during the time Chancellor East sat upon the bench much was done to arrest this slothfulness, and to restore that wise and beneficent administration of justice that, before the war, prevailed under Chancellor Frierson.

There being no system of practice, or scarcely any, solicitors who did not care to try their causes when reached, found but little difficulty in having them continued. And thus the diligent lawyer lost all heart in finding himself forced into the rank and file with the most dilatory. The consequence, of course, was that the docket soon became so frightfully overcrowded as almost to amount to a practical ban upon the institution of new suits. It is scarcely too exaggerated to say that the Court had become an Augean stable that needed the strength of a real Hercules for its thorough cleansing. Such it found in Chancellor Cooper. A Hercules—unwearied, indefatigable, for the labor in hand. The work,—considering its quantity and character,—that he has performed as Chancellor very nearly passes belief. The current of justice, no longer turbid and swollen, runs clear. The practice of the Court has been reduced into an intelligent, intelligible system, that attracts the ad

miration of students, and secures from them their willing observance and study, while it subserves that highest end of justice—the speedy ascertainment and enforcement of proper rights and remedies. The opinions delivered by him at the last term are models of clear, accurate, exhaustive legal thought and expression. The stores of legal lore shown in them,—shown naturally and never with ostentation,—the direct way in which every point raised is met, the subtle accuracy of his legal reasoning, make them among the most valuable of any ever rendered in this country. We are sure that no volume of Reports of any the highest tribunal in this land, would prove, either to the student or practitioner, of greater value or help than these opinions if gathered in book form, and if thus published would, beyond doubt, establish their author the equal of any jurist this country has yet produced.

Considering the accelerated growth of equity jurisprudence, threatening as it does to swallow the forms of the common law altogether, and the vast interests entrusted to its officers, the guardianship of minors and married women and lunatics, the management and settlement of estates, in which almost two-thirds of the wealth of the district is passed upon, it is, surely, matter of felicitation that a member of the Bar in the enjoyment of so lucrative a practice, and of such great and varied abilities, could be found self-sacrificing enough to accept the onerous responsibilities and duties attaching to the office of Chancellor.

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#### DANIEL ON NEGOTIABLE INSTRUMENTS.

We are glad to learn that the work of Jno. W. Daniel, Esq., of the Lynchburg, Va., Bar, on Negotiable Instruments, will be issued sometime during the present spring, from the press of Messrs. Baker, Voorhis & Co., of New York, an old established law publishing firm, the mechanical execution of whose publications heretofore gives assurance that its outfit and general make up will only be equalled by the excellence of its contents. The readers of this REVIEW have been favored, in advance, with several chapters from this work, and have had, therefore, an opportunity of judging of the clear and succinct style in which the author states his propositions, fortified by exhaustive citations of all the authorities. We are sure no work we have at present on the same subject will be found of equal value to the practitioner. We have received many letters from correspondents in which these chapters have been very highly spoken of. We are just in receipt of a letter from W. C. Glasgow, a member of the Bar of LaGrange, Ind., in which he writes: "The articles on Promissory Notes are clear, concise and satisfactory in a high degree." Messrs. Blake & Johnson, of Goshen, Ind., write: "We deem the article on 'Rights of Purchasers of Negotiable Instruments,' one of the finest we have ever read." Had we the space we could multiply such testimonials from all quarters of the country. Those of our present readers who have had no opportunity, as yet, of judging of the value of this forthcoming work have, in this number of the REVIEW, the opportunity offered them in the article on "Exchange and Re-Exchange, and Damages upon Dishonored Negotiable Paper." We extract from an exchange, the Law Bookseller, published by Baker, Voorhis & Co., the following notice concerning it:

"We have great faith in the new work on 'Negotiable Instruments' upon which John W. Daniel, Esq., has been engaged for a long time. Several divisions of the

treatise have been published in the Southern Law Review, and many lawyers have thus had some opportunity to test the value of the work.

The general scope of the book will be a succinct statement of the law as it exists in the United States respecting all Securities which possess a negotiable quality. It will be a treatise on all manner of Negotiable Instruments, including Bills of Exchange, Promissory Notes, Negotiable Bonds, Coupons, Bills of Lading, Bills of Credit, Bank Notes, Checks, Circular Notes, Certificates of Deposit, Guaranties, etc. It will consider these in all their mercantile ramifications, with reference to all recent English and American decisions. Particular attention will be paid to late cases.

The profession needs a new, fresh, and reliable book on the subjects named. The last ten years have developed vast changes in Commercial Law, especially in respect to Negotiable Bonds, Coupons, etc., and none of the old books answer the demands of the present day. Mr. Daniel's work will, we think, be one that nearly every practicing lawyer will find of immediate practical value. We hope to have the volume ready early in the spring of 1874, and invite orders for the book in advance."

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### THE DUTY OF AN ADVOCATE.

We see from a newspaper, the Transcript, published in the town of Danielsonville, Conn., that a prominent lawyer of that State, and a subscriber to the SOUTHERN LAW REVIEW, John T. Wait, Esq., "who has received honors at the bar which must demonstrate to him that his large ability is recognized," is supposed, in the opinion of the editor, "to have done himself a great wrong, and the cause of justice a greater one," by defending a certain man of "notorious bad character," who was thought to have set fire to the barn of "a most honorable, christian citizen." "In the minds of all honest men, who knew all the parties and all the facts, there was not the shadow of a doubt as to who burned it." Yet, strange to say, Mr. Wait "undertook his defense," and actually "sought to screen the culprit from the penalty of a broken law." Now this momentous question immediately arises in the mind of our editor—"believing, as Mr. Wait probably did, that the prisoner was guilty of the crime," was it required of him to undertake his defense? The man on the tripod unhesitatingly answers, no; and proclaims indignantly that justice has been desecrated. It does not seem to have occurred to the mind of this servant of the quill that Mr. Wait possibly may have had no option left him—that his professional duty required of him to pursue the course he did. Says Prof. Christian, in his note to 4 Blacks, Com., 356: "Let the circumstances against a prisoner be ever so atrocious, it is still the duty of the advocate to see that his client is convicted according to those rules and forms which the wisdom of the Legislature have established, as the best protection of the liberty and security of the subject." "From the moment," says Lord Erskine, 6 Campbell's Lives of the Chancellors, 361, "that any advocate can be permitted to say that he *will* or *will not* stand between the crown and the subject, arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what *he may think* of the charge or of the defense, he assumes the character of judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mis-

taken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel." Chief Justice Hale once remarked that if the Court were to appoint counsel for the prisoner and he were to refuse to act, "we should make bold to commit him to prison." And yet the Chief Justice himself, according to Lord Campbell, "began with the specious but impracticable rule of never pleading except on the right side, which would make the counsel to decide without knowing either facts or law, *and would put an end to the administration of justice.*" Bishop Burnet, however, tells us that he "afterwards abated much of the scrupulosity he had about causes that appeared at first unjust, upon this occasion: There were two causes brought him, which, by the ignorance of the party or their attorney, were so ill-represented to him that they seemed very bad; but he, inquiring more narrowly into them, found they were really very good and just; so after this he slackened much of his former strictness of refusing to meddle in causes upon the ill circumstances that appeared in them at first:" Burnet's Life of Hale, 1 Hale's Works, 59. And not only this, but Sir Matthew actually proselyted others to his changed views on this subject. Says Baxter, in Burnet's Life of Hale, 106: "Indeed Judge Hale would tell me that Bishop Usher was much prejudiced against lawyers because the worst causes find their advocates; but that *he* and Mr. Selden had convinced him of the reasons of it to his satisfaction; and that he did, by acquaintance with them, believe that there were as many honest men among lawyers, proportionably, as among any profession of men in England (*not excepting Bishops or divines*)." What a truly christian concession this of the worthy Bishops! Can not the editor of the Transcript be prevailed upon to "abate somewhat of *his* scrupulosity" also? Let him reflect that many cases are recorded in the books of innocent persons *confessing* themselves guilty of capital crimes, and only being sheltered from death by those houses of Refuge opened to them by the strong arm of the Law. Any other rule than that which allows to one accused of crime the fullest, freest and most impartial trial, *under the established rules of law*, he may rest convinced would work the most mischievous, perhaps ruinous, consequences. And though, now and then, these rules may operate to prevent the punishment of the guilty, yet is it not far better, after all, that ninety-nine guilty ones should escape than that one innocent one should be made to suffer? So, at least, echoing the precept of the divine law, authoritatively declares our "collected wisdom of ages."

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## JURIES.

The prostitution of the jury system, in the trial of criminal cases, has grown to such alarming proportions, in some of the States, as to demand immediate attention and, if possible, abatement. In this community, for instance, we have, constantly sauntering about the court rooms, a class of men, as ignorant and lazy as Italian lazaroni, who appear to eke out a miserable livelihood by serving on juries. They seem to have no other means of support, and are nicknamed "professional" jurors. Verdicts are almost daily returned, affecting human life and liberty, that shock all sense of justice, and outrage the country and time in which we live. These, not unfrequently, are set aside by the Judge, but this only mitigates, does not eradicate the evil. Such juries take the law into their own hands as completely and defiantly as does a mob. The murderer is allowed to go "unwhipped of justice," while the

petty thief is sentenced to the sternest penalty the law permits. The consequence of which is, that in order to escape punishment the criminal has only to merge the lesser offense in the larger.<sup>1</sup> Can not the Legislature remedy this growing evil by exacting an educational qualification of jurors serving on criminal trials?

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### LOUISIANA.

Prof. Cooley, author of "Constitutional Limitations," has the following foot-note in his new edition of Story's works:

"An inferior Federal Judge, without a shadow of authority, and, consequently, in defiance of law, and, for that reason, supported by no presumption of correct motives, and with scarcely a pretense of observing even the usual forms, by the process of his court, aided by a military force, installed in power a State Government which he sided with against rival claimants; and, in consequence of a pressure of business in Congress precluding prompt attention to the case by that body, has been enabled to sustain that Government in power until the present time. Mr. Justice Story has with reason predicted that 'if a despotic or monarchical Government were established in one State, it would bring on the ruin of the whole Republic.' What Government can be more despotic than one elected by an injunction, and continued in power by a military force under the order of a Judge who, having no jurisdiction, is restrained by no law but his own arbitrary will? . . . The dullest mind can not fail to see that the facility with which the wrong is committed, and the possible immediate advantages which individuals may derive therefrom, present constant temptations to its repetition, and, if suffered once to pass unrebuked, a precedent will be tacitly asserted which can not fail to threaten constant danger to our liberties."

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### STAY LAWS.

We are unable to perceive the justice or necessity of giving a defendant the right to stay execution from a Justice's judgment. If the debt is due and just, and the defendant fully able to satisfy it, it seems without the shadow of reason that he should be permitted arbitrarily to put off its collection for eight months. If the Justice renders a wrong judgment, the defendant's remedy is plain—either by an appeal to the proper appellate court, where the time allowed for praying an appeal has not passed, or where it has expired, through no fault of his, then by *certiorari*. It was not to prevent injustice that stay laws were enacted. What reason can be alleged that a just debt, already due, should be stayed, without just cause being assigned?

The fact is, our Legislatures are throwing altogether too many shields around debtors—bankrupt laws, exemption laws, stay laws—as though all creditors were Shylocks and all debtors Antonios. It is but the natural rebound, no doubt, from those harsh laws of former times in favor of the creditor-class against the debtor—such as imprisonment for debt, etc.

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<sup>1</sup> In Russia, we are told, where the punishment of robbery and murder is the same, they always murder. The dead, say they, tell no tales: *Present State of Russia by Perry*.

It is a great abuse amongst us to condemn to the same punishment a person that only robs on the highway, and another who robs and murders. Surely, for the public security, some difference should be made in the punishment: *Montesquieu's Spirit of Laws*, vol. 4, 104.

## USURY.

Nearly every country has taken steps to prevent usury, and keep down the interest of money; and the invariable rule has been to increase usury, and raise the interest of money. For, since no prohibition, however stringent, can destroy the natural relation between demand and supply, it has followed that when some men want to borrow, and other men want to lend, both parties are sure to find means of evading a law which interferes with their mutual rights. If two parties were left to adjust their own bargain undisturbed, the usury would depend on the circumstances of the loan; such as the amount of security and the chance of repayment. But this natural arrangement has been complicated by the interference of Government. A certain risk being always incurred by those who disobey the law, the usurer, very properly, refuses to lend his money unless he is also compensated for the danger he is in from the penalty hanging over him. This compensation can only be made by the borrower, who is thus obliged to pay what is in reality a double interest; one interest for the natural risk of the loan, and another interest for the extra risk from the law. Such, then, is the position in which almost every Legislature has placed itself. By enactments, it has increased what it wished to destroy; it has passed laws which the imperative necessities of men compel them to violate; while, to wind up the whole, the penalty for such violation falls on the borrower; that is, on the very class in whose favor the Legislature interfered: *Buckle's History of Civilization in England*, vol. i., p. 205.

## LEGAL RESTRAINTS.

We habitually assume that only by legal restraints are men to be kept from aggressing on their neighbors; and yet there are facts which should lead us to qualify our assumption. So-called debts of honor, for the non-payment of which there is no legal penalty, are held more sacred than debts that can be legally enforced; and on the Stock Exchange, where only pencil memoranda in the respective note-books of two brokers guarantee the sale and purchase of many thousands, contracts are safer than those which, in the outside world, are formally registered in signed and sealed parchments: *Herbert Spencer's "Sociology."*

## GIFTS INTER VIVOS.

Judge Sharswood, in delivering the opinion of the court in the case of *Soper v Guernsey*, 71 Pa. R., p. 223, says: It is not an uncommon arrangement for a father to make a conveyance of his farm to one of his sons in consideration of being supported, nursed and attended during his life. The wisdom of such a contract is very questionable, even where the most entire confidence is felt at the time in the affection of the child. The son of Sirach pronounces emphatically against it: "Give not thy son and wife, thy brother and friend, power over thee while thou livest, and give not thy goods to another, lest it repent thee, and thou entreat for the same again. As long as thou livest and hast breath in thee, give not thyself over to any. For better it is that thy children should seek to thee than that thou shouldst stand to their cour-

tesy. In all thy works keep to thyself the pre-eminence: leave not a stain on thine honor. At the time when thou shalt end thy days and finish thy life, distribute thine inheritance." *Ecclesiasticus* xxxiii. 19-23. The most striking illustration of the same thing is in the pathetic tragedy of Lear, where the fool confirms the opinion of the wise man of the Apocrypha: "Would I had two coxcombs and two daughters. If I gave them all my living, I'd keep my coxcombs myself." One of the evil consequences which seems almost invariably to attach itself to such arrangements is the distressing family discord and lawsuits which spring from them. It is not always easy to administer justice in such cases in conformity to law. The natural feeling of right prompts to the rule which would hold the child to the strict performance of his part of the contract, and give to the parent the right to recall the gift if he fails. Yet it is not always possible to apply such a rule. The deed may want the essential words to make a condition. A condition in a conveyance may be enforced by ejectment, but a consideration, even amounting to a covenant on the part of a vendor, can not: *Cook v. Trimble*, 9 Watts, 15; *Garver v. McNulty*, 3 Wright, 473; *Perry v. Scott*, 1 P. F. Smith, 119.

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### CAPITAL PUNISHMENT.

In a charge delivered to the Grand Jury of the Island of Bombay, on the 20th of July, 1811, Sir James Mackintosh gives the following interesting comparison of the ratio of crime during a period of seven years in which the death penalty was inflicted and a like period in which it was suspended:

"Since my arrival here, in May, 1804, the punishment of death has not been inflicted by this court. Now, the population subject to our jurisdiction, either locally or personally, can not be estimated at less than 200,000 persons. Whether any evil consequences have yet arisen from so unusual—and, in the British dominions, so unexampled—a circumstance as the disuse of capital punishment, for so long a period as seven years, among a population so considerable, is a question which you are entitled to ask, and to which I have the means of affording you a satisfactory answer.

"The criminal records go back to the year 1756. From May, 1756, to May, 1763, the capital convictions amounted to 141, and the executions were 47. The annual average of persons who suffered death was about 7; and the annual average of capital crimes ascertained to have been perpetrated was nearly 20. From May, 1804, to May, 1811, there were 109 capital convictions. The annual average, therefore, of capital crimes, legally proved to have been perpetrated during that period, is between 15 and 16. During this period there has been no capital execution. But as the population of this island has much more than doubled during the last fifty years, the annual average of capital convictions during the last seven years ought to have been 40, in order to show the same proportion of criminality with that of the first seven years. Between 1756 and 1763, the military force was comparatively small; a few factories or small ports only depended on this Government. Between 1804 and 1811, five hundred European officers, and probably four thousand European soldiers, were scattered over extensive territories. Though honor and morality be powerful aids of law with respect to the first class, and military discipline with respect to the second, yet it might have been expected, as experience has proved, that the more violent enormities would be perpetrated by the European soldiery—uneducated and sometimes depraved as many of them must be—often in a state of mischievous idleness—commanding, in spite of all care, the means of intoxication, and corrupted by

contempt for the feelings and rights of the natives of this country. If these circumstances be considered, it will appear that the capital crimes committed during the last seven years, with no capital execution, have, in proportion to the population, not been much more than a third of those committed in the first seven years, notwithstanding the infliction of death on 47 persons. The intermediate periods lead to the same results. The number of capital crimes in any one of these periods does not appear to be diminished either by the capital executions of the same period or of that immediately preceding; they bear no assignable proportion to each other.

"In the seven years immediately preceding the last, which were chiefly in the Presidency of my learned predecessor, Sir William Syer, there was a remarkable diminution of capital punishments. The average fell from about four in each year, which was that of the seven years before Sir William Syer, to somewhat less than two in each year. Yet the capital punishments were diminished about one-third . . . . . Two hundred thousand men have been governed for seven years without capital punishment, and without any increase of crimes."

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#### DANIEL LORD, JR.

A lawyer from the country once entered the Court of Appeals while Daniel Lord, Jr., of New York, was arguing a case, and inquired of Mr. Charles O'Connor, who was sitting near by, "who that was addressing the court?" Mr. O'Connor, whose feelings must have been nettled by the course of the argument, replied: "That is Daniel Lord, *Jun.*, and he puts the *Junior* after his name so he may not be mistaken, for the Almighty!"

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#### AN IRISH COURT.

At the Limerick sessions recently, the jury, after a quarter of an hour's absence, returned into court: "We find him not guilty."

*Chairman*—Are you unanimous in your verdict?

*Foreman*—We are, your worship; we are nine to three. [Great laughter.]

*Chairman*—This is not a proper verdict.

*Foreman*—We first decided, your worship, that the minority should be ruled by the majority, before going into the merits of the case. We then became all unanimous in the end. [Laughter].

*Chairman*—But how could you be unanimous when you say you are nine to three?

*Foreman*—Your worship, I took down those who were for finding him guilty, and those who were for acquitting him, and the minority agreed to the verdict of the majority.

*Chairman*—Oh! Go inside, each of the three men who were in the minority, are they of opinion that this man is guilty? Go inside and let them agree about it. I don't want to hear any more of your deliberations; go inside, and let them find that this man did not strike the prosecutor.

The jury then retired, and after a few minutes re-entered and handed in a verdict of "not guilty."

Chairman (to the jury)—Gentlemen, you have agreed to your verdict. You say that the prisoner is not guilty?

Foreman—We do.

Chairman—Is that the verdict of the whole of you?

Several Jurors—Yes, your worship.

Chairman—Discharge the prisoner now. (To the prisoner). I hope if you ever come here again you will not get off so easy.

Prisoner—It is my first offense, and it will be my last. [Loud laughter, in which the whole court joined.]

Chairman—But the jury say you have done nothing at all. [Laughter.]

### TIMIDITY IN YOUNG ADVOCATES.

Nothing is more unfriendly to the art of pleasing than *morbid timidity* (*bashfulness*—*mauvaise honte*). All life teems with examples of its prejudicial influence, showing that the art of rising in life has no greater enemy than this nervous and senseless defect of education. Self-possession—calmness—steady assurance—intrepidity—are all perfectly consistent with the most amiable modesty, and none but vulgar and illiterate minds are prone to attribute to presumptuous assurance the apparently cool and unconcerned exertions of young men at the Bar. A great connoisseur in such matters says that “what is done under concern and embarrassment is sure to be ill done;” and the judge (I have known some) who can scowl on the early endeavors of the youthful advocate who has fortified himself with resolution, must be a man poor in the knowledge of human character, and, perhaps, still more so in good feeling: *Hoffman's Course of Legal Study*.

### LAWYER AND CLIENT.

When the relation of solicitor and client exists, and a security is taken by the solicitor from his client, the presumption is that the transaction is unfair; and the onus of proving its fairness is upon the solicitor: *Evans v. Ellis*, 5 Denio, 640; *Newman v. Payne*, 2 Ves., 199; *Walmsley v. Booth*, 3 Atk., 25; *Montesquieu v. Sandys*, 18 Ves., 313; *Stockton v. Ford*, 11 How. U. S., 247; *Starr v. Vanderheyden*, 9 Johns., 253; *Hocell v. Ransom*, 11 Paige, 538; *D'Rose v. Foy*, 4 Edw. Ch., 40; *Lewis v. J. A.*, Ib.; *Borien v. McLane*, 1 Hoffman Ch. Rep., 424; *Miles v. Ervin*, 1 McCord Ch. Rep., 524; *Rose v. Mynell*, 7 Yerger, 30; *Bibb v. Smith*, 1 Dana, 482; *Smith v. Thompson's Heirs*, 7 B. Monroe, 308; *Jennings v. McConnel*, 17 Ill., 148.

An agreement made by a client with his counsel, after the latter had been employed in a particular business, by which the original contract is varied, and greater compensation is secured to the counsel than may have been agreed upon when first retained, is invalid and can not be enforced: *Lecatt v. Salle*, 3 Porter, 115; *Sharswood's Legal Ethics*.

## LONDON LAW AND LAWYERS.

In London there are nearly four thousand attorneys at law, and very little short of three thousand barristers at law. In the computation of the number of the former however, is not included those who have been admitted but have not taken out the annual certificate or license which enables them to practice. These are mostly acting as clerks, managing or otherwise, to the more fortunate members of the profession who have business of their own to attend to. In the list of barristers is included, many who are not in active practice, some having been called to the bar simply to give them a position in society, and others, having failed in obtaining legal business, devoting themselves to literary and other pursuits; but perhaps the numbers omitted in the first list and included in the second will counter-balance each other and render the aggregate of the figures I have above given about correct as to the number of lawyers in actual practice. In England, the legal profession, large as is the number of its members, is as close a corporation as can be imagined.

To commence with the barristers, who are entirely and completely a distinct body of men from the attorneys. The etiquette of the bar does not allow a barrister to have any communication whatever with the client except through the agency of an attorney. He has no remedy at law for the recovery of his fees, and therefore gets money in advance as a general thing. He alone is entitled to plead in the superior courts, where he wears the time-honored wig, gown and starched bands. There are barristers and barristers—sergeants at law, Queen's counsel, and juniors—but my space will not permit me to describe all the niceties of distinction between them in regard to precedence. Most of the barristers are university men who have graduated; and in that case before entering on his legal studies the candidate has to submit to no examination on general educational matters. If, however, he is not a graduate, he has a severe series of questions to answer on paper, in classics, mathematics, modern languages, history, etc. If he satisfactorily passes this ordeal he is allowed to become a student, and, upon the payment of a pretty large fee, he enters the chambers of a barrister, and studies with him for a specified number of terms, nominally extending over a period of about three years. In the meantime he has to pass an intermediate examination, and at the close of studentship he is put through another raking process and is then "called" to the bar. This entitles him to put on a wig and gown; he is a gentleman by act of Parliament; and he is at liberty to wait as long as he likes until the attorneys choose to employ him. It is a lottery, and the prizes are comparatively few, but some of them are splendid—the blanks, however, are very numerous, and I am afraid to say how small is the average income made by these gentlemen learned in the law. The fees received by them, of course, vary with the nature of the case and the eminence of the man employed; but advocates like the Attorney-General (Sir John D. Coleridge), Mr. Sergeant Ballantine, Mr. Hawkins, Q. C., Mr. Sergeant Parry, Sir John Karslake, Q. C., and a few others, earn immense incomes. The first named gentleman, in his official capacity of law officer of the crown, has a salary of \$40,000 a year during his term of office, and, in addition to that, his private practice is something appalling. In the Tichborne case alone, after receiving an enormous retaining fee, he had "a refresher" of \$250 per day, and, as the trial lasted 103 days of actual work, you can compute for yourself the nice little plum he had. On the other hand, men of great eminence will take very small fees in very small cases, which they are enabled to do owing to the extremely rapid and thorough way in which such cases are disposed of. I have known Mr. Hawkins, above mentioned, to try a cause for \$50, but then in term time he very often tries four, five, or six a day, and he is reputed to be immensely rich. I was told he was

worth \$1,500,000, which is an immense sum for a man to save out of brain labor. The reverse of these brilliant pictures, however, is that of the poor barrister who stands about Westminster Hall year after year without getting a brief; one of them died only a week or two ago from sheer starvation.

The attorney forms the medium by which communication is held between the unfortunate layman and the barrister who is lucky enough to get a brief to put in his indispensable blue or red bag. He is not generally a graduate, but as a rule enters in office as an articled clerk at about seventeen or eighteen years of age. The formalities preceding admission are now much the same, except that he has to study with an attorney instead of a barrister, and for a period of five years, with the following exceptions: If a graduate of a university, the preliminary examination is dispensed with, and his term of study is reduced to three years; and if the candidate has been a managing clerk to an attorney for ten years, his term of apprenticeship is reduced in like manner, but he can only obtain absolution from the much-dreaded "preliminary" upon application by memorial to the Law Institute, showing good cause and backed up by influential names. The student has to pay a premium of from \$250 to \$1,500, the Government demands a revenue stamp of \$400 on his articles of apprenticeship, and he earns nothing for five years. If he is fortunate or smart enough to escape being "plucked," at the end of this time he is admitted, and, like the barrister, is entitled to do any amount of business he can get. If his funds have become exhausted (as is not unfrequently the case), he is obliged to take a clerkship and trust to perseverance and luck to become a member of a firm. If, however, he has any money, he can buy a partnership, and then, if he is ordinarily intelligent and energetic, he is as sure as one can be in this world, of a decent income. It is this great extent of restriction to admission to practice as an attorney, which renders it possible that such a vast amount of business can be accumulated into the hands of one firm as it is here. A lad leaves school say at fourteen, and goes into a lawyer's office. In New York, when he attains the age of twenty-two or twenty-three, he will, if he has anything in him, become admitted upon easy terms, and stick up his shingle as a full-blown attorney and counsellor-at-law. In England, perhaps one out of two or three hundred attain to that dignity. The consequence is that we have firms here employing as many as one hundred and more clerks, the majority of whom never expect to attain to any better position than that which they now hold. The business is divided into different departments, which are as distinct and separate as those in a wholesale dry goods establishment, and at the head of each of these departments is usually an able gentleman who has as complete a control over it as though he were in business for himself; but, no matter with what skill and energy he may manage matters, he has usually the satisfaction of knowing that he can never hope to better his condition, because he is not "admitted" (he may get a slight increase of salary, but what is that to look forward to?), and he finds himself very frequently compelled to teach two or three embryo attorneys their business—these being young gentlemen who are parents able to pay the large amounts necessary to invest them with all the stories of articled clerkship: *Correspondence of the New York World.*

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### NEW YORK CITY LAWYERS.

There are about 5,000 lawyers in the directory issued for their professional guidance. Of this number, doubtless, 1,000 are ornamentals and possess family competence. Of the aggregate not more than 100 possess popular distinction. There are scores of attorneys in this city who are scarcely heard of out of their immediate clientage, and yet could match dollars with any one of the 100. These "no names," as Wilkie



Collins might call them, are conveyancers, or patent agents, or real estate men, guardians of family interests or those of corporations. While, as is the opposite of the English rule, a lawyer here may practice all branches at once, yet the tendency has been to force our city lawyers into special branches. Classes devote themselves exclusively to pleading, or examining titles, or in patent cases, testamentary affairs federal court practice, criminal jurisprudence, building law, railroad law, insurance law, and law relating to damage of person or property. Unhappily for many, there are a few who peculiarly attend to the manufacture of divorces. In consequence of this drifting into specialties, not only litigants employ lawyers, but lawyers retain each other for distinctive familiarity with some one branch. The oldest lawyer in the city—except, perhaps, some nonogenarian, long ago stranded and forgotten—is the elder Gerard. The youngest is that alert chap with a big bundle of papers, who will sit to-morrow under the shadow of Mr. O'Connor, in the Supreme Court, and look as abashed as if the eyes of Delaware were on him.

What must be the aggregate yearly amount paid to this army of lawyers? This computation appertains to the well-known apothegm, "the many labor that a few may reap." If the 5,000 average \$100 only per year, here would be half a million in money. The general average is, however, nearer a thousand, which would foot up five millions of money to the fraternity in fees and costs. Such distribution in individual cases, would vary all the way from \$500 per year to \$150,000. There are several firms who undoubtedly accumulate the latter sum annually, and, moreover, spend it easily. Then there are out of the whole number, certainly three thousand to each of whom \$1,500 a year is the maximum allowance. Besides the lawyers come the judges, clerks, officers, sheriffs, stenographers, witnesses, printers of law points, &c., whose salaries, stipends and fees are paid in addition to those of the bar. Perhaps \$6,000,000 or \$7,000,000 per year would be a fair estimate for the sum yearly spent in New York City for the luxury of litigation. Who can tell the number of oysters consumed except by tallying the shells? Let each litigant count the shells remaining after his legal repast, if he has had one, and then verify by the reminiscence these statistics.

One often hears of a lunch at bar, but if it is desired to see the Bar at lunch, on and after to-morrow's opening day, it can be done at Chambers street (Delmonico's), between the hours of one and two, when occurs the usual half-hour Court recess. Many lawyers have remained in the Court-rooms to munch the traditional sandwich, and perhaps, do a bit of lobbying or note-taking at the same time. Some of the judges, in their private rooms, are tasting bivalves more satisfying than the proverbial oyster of legal contention, but, during the hour just designated, two-thirds of the Delmonico lunchers will be of the Bench and Bar. Then laymen loiterers can pick up a few jocular condiments for their chicken gumbo and fillet of sole. They can see dignified judges relax, and parlor barristers toy, with minced veal more effectually than they have hashed witnesses with the characteristic calf-skin. Great lawyers usually live well, work hard and die poor: *Correspondence of the New York Herald.*

## ORIGIN AND HISTORY OF "LEGAL MEMORY;"

OR, "THE TIME WHEREOF THE MEMORY OF MAN RUNNETH NOT TO THE CONTRARY."

"To make a particular custom good, it must have been used so long that the memory of man runneth not to the contrary: 1 *Blk. Com.* 70.

At common law, a person suing for a freehold was bound to show that he or his ancestor had been in possession within the time of memory; that is, within the

memory of a person living, or of his father, who, if not present at the actual feoffment or investiture of the party *disseized*, had seen him in the peaceable *seizen* of the land, and acting as one of the  *pares* of the lord's court; the rule of law formerly being that no man could prove any matter unless it had been seen by himself or by his father, who had enjoined him to testify the fact: *Bract. lib. 5, cap. 5, s. 3, fo. 373, a. 2, Inst. 94.*

It being found inconvenient to leave the rights of parties dependent on the longevity of witnesses, it was thought desirable to remove this uncertainty, without materially enlarging or abridging such rights.

The first fixed epoch appears to have been the accession of Henry I. (on the 1st of August, 1100). So matters continued until 1235, when it was thought that a period of 135 years was an unreasonable substitution for the reach of human memory, occasionally prolonged by the injunction above referred to—from its nature, of too rare occurrence materially to effect the period of limitation.

By the Statute of Merton (1235) c. 6, an epoch more nearly approaching the actual duration of human remembrance was introduced, viz., the coronation of Henry II., which had taken place eighty-one years before, namely, on the 20th of October, 1154. In 1275 the eighty-one years had swollen to 121 years; which being considered an absurdity a new epoch was introduced, viz., the time of Richard I., i. e., his coronation in 1189, being eighty-six years before. This continued unaltered until 1540, when the more convenient rule of sixty years before action brought, was introduced. During the whole interval between 1275 and 1540, the coronation of Richard I., in 1189, was the period of legal memory in respect to writs of right; shorter periods being adopted with respect to the limitation of possessory actions. From the very frequent recurrence of this, as the longest period of limitation, in the discussion which took place daily in this court (Court of Common Pleas) in respect of real actions, it was thought convenient by the Judges that in all cases of customary or prescriptive rights, depending upon the memory of man, the same epoch should be resorted to. And this usage resting solely upon an arbitrary introduction of a rule of analogy resting upon the Statute of Edward I., in 1275, had become so inveterate before 1540, that when the statute of 1275 was repealed in 1540, a rule, which had no other foundation than the repealed statute, was tacitly allowed to remain, and it has continued down to our own times: *Vide 2 and 3 W. 4, c. 71.*"

Extract from note to *Cassidy v. Stewart* (2 Manning and Granger, 469), 40 Eng. Com. Law Rep., 466.

## THE TICHBORNE TRIAL.

The conviction of the Tichborne claimant on the charge of perjury, and his sentence to fourteen years of penal servitude after a trial which lasted one hundred and eighty days, have revived public interest in this extraordinary case.

The Tichborne family is one of the oldest in England, the estates in Hampshire having been in the possession of Roger's ancestors even before the advent of William the Conqueror. The first baronet was Sir Benjamin, who was created by James I. in return for the zeal he exhibited in his cause, as immediately upon the death of Queen Elizabeth, and without waiting for any order or authority, he posted to Winchester, and there, in his capacity of sheriff of the county, proclaimed the Scottish monarch King of England.

Roger Charles Doughty Tichborne was the eldest son of the late Sir James Tichborne, Bart., and Henriette Felicite, his wife, who was a descendant of the ancient French family of De Bourbon Conti. He was born on the 5th of January, 1829, and for the first sixteen years of his life resided with his parents in France. His education was at first intrusted to private tutors, but as he was a child of somewhat delicate constitution, his mother's over-indulgence prevented his receiving much benefit from their instructions. Sir James, anxious for the boy's mental welfare, brought him to England and placed him in the care of the Jesuit fathers at Stonyhurst, where he remained rather more than three years. Still he had not made much progress, and it was thought that if he entered the army the training for the necessary examination would do him good. In 1849 he accordingly became a cavalry officer, and, with the exception of occasional leave of absence, was quartered with his regiment, first in Ireland and afterward at Canterbury, until he gave up his commission in 1853. In the mean time he had fallen in love with Miss Kate Doughty, his cousin, but the young lady's parents were averse to the proposed match, both on account of Roger's bad habits of drinking and smoking to excess, and because, being Roman Catholics, a union between first cousins was unlawful to them, except under the Pope's dispensation. Roger was told that he had better keep away from his uncle's house, but afterward Sir Edward Doughty relented so far as to say that if, after three years' probation, the young lovers both remained of the same mind, he would no longer oppose their wishes. Roger promised to reform his habits, and determined to go on foreign service, but, after some fruitless endeavors to exchange into a regiment under orders for India, he left the army, and in March, 1853, sailed for South America, having previously made his will, and confided a "sealed packet" to the care of Mr. Vincent Gosford, the steward on one of the Tichborne estates. He reached Valparaiso in June, and after traveling about that part of the world until the following April, he embarked at Rio de Janeiro on board the *Bella*, for New York. The vessel was lost, all on board were supposed to have perished, and when Sir James Tichborne died, Roger's brother Alfred took the title and estates. The late Dowager Lady Tichborne, however, could never be brought to believe that her son Roger was really dead; she advertised extensively for him, and one of her advertisements appearing in an Australian newspaper in 1865, was seen by Mr. Gibbes, an attorney of Wagga-Wagga, who, knowing the defendant, and seeing him one day smoking a pipe whereon were carved the letters R. C. T., at once "spotted" him as the "Wandering Heir." Then followed some correspondence between Lady Tichborne and the defendant, and the latter became acquainted with a man of color named Bogle, an old servant of the Tichbornes, who was then living at Sydney. One of Lady Tichborne's letters contained an allusion to the fact that Roger having been a "good Catholic," and on receipt of it the defendant, who had been some time before married by a Wesleyan minister, went through the ceremony again, according to the rites of the Church of Rome. In September, 1866, he sailed from Sydney, accompanied by his wife and Andrew Bogle, and on his arrival in Europe was welcomed and recognized by Lady Tichborne, though the other members of the family failed to identify him. Then began the legal proceedings. Evidence was taken by commission both in Australia and Chili; there was a suit in Chancery, followed by an ejectment action in the Court of Common Pleas—*Tichborne v. Lushington*—in which was witnessed the singular phenomenon of the defendant in the cause appearing in court to give evidence in favor of the man who had brought the action against him. The defendant in the recent trial, who was claimant in that suit, himself underwent a long examination, and when the jury stopped the case, his legal advisers consented to a non-suit, and

he was committed by the late Lord Chief Justice Bovill to take his trial for willful and corrupt perjury. His story is that he is really Roger Tichborne, who, after the wreck of the *Bella*, was picked up by a vessel called the *Osprey*, which carried him to Melbourne, and that he afterward lived in Australia under the name of Castro. On the other hand, the prosecution affirm that he is one Arthur Orton, the son of a butcher of Wapping, who, having made a voyage to South America, and staid there from 1849 to 1851, returned to England, and in 1852 finally left that country for Australia, and there lived as a butcher and stock-keeper until he set up the claim to the Tichborne title and estates, out of which the recent trial for perjury arose: *Harper's Weekly*.

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### TO OUR SUBSCRIBERS.

It is a well established rule that when a subscriber, especially to a periodical of this kind, fails to notify the publisher of his wish to discontinue his subscription, an implied assent or direction is thereby given for its continuance. And this is just. It is, moreover, recognized as just by the law. The expense and labor, necessarily to be incurred, were the publisher required at the end of each term of subscription to notify the subscriber, and to request a renewal thereof, would be very great, and would probably in most instances, render an enterprise of this character wholly impracticable. Whereas, the subscriber, should he wish to discontinue, by postal card notification is put to but little labor and an expense of only one cent. We wish to say a few plain words on this subject. We want our list of subscribers increased, but not with the names of those who pay us only in unctious self-laudatory expressions of patronage. We do not stand in need of this. Kindly words of encouragement and praise are appreciated and valued. But we wish it understood, and distinctly, that we deem this publication a worthy one, and a full and fair equivalent for the price of subscription asked for it. We wish no one to subscribe to it who does not think this also; and if there are any such among our present subscribers, we would like to know that fact, and assure them of their mistake. We are compelled, however, until notified, to take for granted that those who fail to so notify us, wish their subscription renewed, and accordingly the first number is sent them with bill for the year. What we have written has been provoked by the fact that some of last year's subscribers, upon receiving bills for the present year, have answered us that they did not authorize a renewal of their subscription. And yet these gentlemen received the first number of the present volume, paid postage, as the law requires, *for the entire year*, on receipt of that number, saw their names advertised in the Chart of the Southern Law Review Union, retained the copies sent them for months, and when returned, if at all, soiled, and consequently worthless to the publishers, and in the face of all this, put in this plea as an excuse to justify their refusal of payment. To whom we reply—if, upon the expiration of your subscription, you did not wish its renewal, you should have so informed us. Your failure to do so, was authorization to us to continue it. As lawyers, you should have known that this has been so held and declared repeatedly by courts of the highest authority, and strictly in consonance with natural reason and equity. As gentlemen, you ought to have known that good morals required it—forbade, at least, your receiving the numbers, using them until rendered worthless to the publishers if returned, and after you had enjoyed all the benefit you were capable of deriving therefrom.

We have received many letters from different portions of the Union, some from quite eminent jurists, testifying to the merit and worth of this REVIEW. In many of the States it is already being quoted and referred to as a high authority. It is the only legal periodical published South, and we confidently assert second to none in the United States. One of its aims, surely a laudable one, and one which, if at all likely to succeed, should have at once rallied to it the united support of, at least, the Southern Bench and Bar, was, to represent and to aid in developing and maturing the highest legal culture of this section. If the lawyers of the South approve, and feel interested in the success of this attempt, assuredly it is but right they should evidence it by kindly word and deed. We bespeak the assistance of our present subscribers in enabling us to increase our circulation to that extent that the future of the REVIEW, as one among the first legal periodicals in the United States, may be beyond peradventure assured. We promise them that everything in our power shall be done to make it merit their patronage, and reflect the highest type of legal knowledge and thought.

# THE SOUTHERN LAW REVIEW.

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## MODERN THEORIES OF GOVERNMENT.

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### NUMBER THREE.

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*"Je le dirai toujours, c'est la moderation qui gouverne les hommes et non pas les vices." Montesquieu. Esprit des Loix. L. xxii, c. 22.*

*"A revolution is always the fault of the Government, never of the people." Goethe.*

It is not a little remarkable that the two best works on the Constitutional Governments of the Anglo-Saxons should have been written by foreigners. The analysis of the English Constitution by DeLolme is still without a rival, and DeTocqueville's work on Democracy in America is confessedly a *chef-d'œuvre*. Of the two the meed of praise must certainly be awarded to the latter. In depth of thought, breadth of view, and severe impartiality, DeTocqueville is head and shoulders above his predecessor. The citizen of Geneva is, however, no mean rival. The clearness with which he has developed the fundamental principles of the English constitution, and the admirable manner in which he has illustrated their merits, deservedly give him high rank as a publicist. The weak point of his treatise is that it is too much of a panegyric. He can see no defects in the English constitution, while he is sharp sighted enough as to those of other governments. It is, in fact, not a little amusing to see with what unction he cites the ills which have accompanied the workings of the institutions of other nations, both republican and royal, while he carefully ignores those which unquestionably have attended every stage of English life. Thus, for example, he dwells upon the utter inefficiency of the laws which were from time to time passed at Rome for the protection of the life of

the private citizen, when he might just as well have drawn his illustrations from English history. It is notorious, that although Magna Charta, by which were nominally secured the liberty of the citizen, "except by the judgment of his peers or the law of the land," and the administration of justice "without sale, denial or delay," was obtained in 1215, and subsequently confirmed as many as forty times (eleven times in one reign, that of Edward I.), yet its provisions were continually violated until a change of manners and increase of intelligence had altered not the law but the practice. He himself well says of the importance of the article of Magna Charta containing these provisions: "That it may be said to include all that society has in view, and the English, from that moment, would have been a free people, if there were not an immense distance between making laws and observing them."

The weak point, as I have styled it, or rather the fundamental error of DeLolme's work, is, that it undertakes to trace all the advantages of English institutions in their practical workings to the mere form of the government, without reference to the character of the people, the peculiarities of Anglo-Saxon civilization, or the insular position and climatic features of the country. In other words, he treats the status of the English nation as the logical sequence of the combined elements of its form of government, instead of the harmonious result of a number of other, and, perhaps, far more potent causes. The eulogistic character of his work, if not the weakness of his reasoning, will appear clearly when you reduce his proposition to its simple elements. Given a king in whom is centered all executive power, and from whom all honors flow, an aristocracy, independent and hereditary, and a popular representation holding the strings of the public purse, and the most perfect form of government follows of course. Be it so. But all the feudal nations of Europe had, at one time, precisely the same elements. Yet not one of them has ever enjoyed the same amount of individual freedom, with the same stability of fundamental forms. Are these results due to the form which England has had in common with others, or to those elements peculiar to herself, her people and her location? Besides, the corner-stone of DeLolme's superstructure, the key-stone of his arch, is the royal authority, and, yet, experience has shown it to be the least important element of the mixture, for it was greatest when the government was the least perfect, and it has waned as the government has improved. Even before DeLolme wrote, England was ruled by her aristocracy.

Since his day the King has become a mere cypher, like the titular Emperor of Japan. The ministry, whose term of office depends upon Parliament, exercise all the royal powers. Nature, I venture to say, has had more to do in controlling the practical workings of the English institutions, and shaping these institutions from time to time, so as to produce a happy equilibrium, than the mere formal elements of the government. The prosperity and greatness of the English are due more to race than to government. The people are better than their institutions. I am slow to believe that a government which is based upon a hereditary aristocracy, which is founded upon principles looking mainly to the interests of a few, and the subjection of the many, which violates every feeling of natural law by providing for the eldest son to the exclusion of all the other children, and which is characterized by a grasping ambition and an unbounded selfishness, is suited for other than a limited locality, or temporary existence. Such institutions will not bear transplanting. They will perish, although the race may survive, at any rate, in other climes.

That the practical workings of the English institutions were always better than the institutions themselves, is evident from the fact that their relative superiority has been recognized through every change of those institutions. "In my opinion," says Comines, (*Memoires*, T. 1 L. V., c. xix.) "among all the sovereignties of the world of which I have any knowledge, the place where public affairs are best managed and where the people are subjected to the least violence, is England." The praise of Montesquieu is even more emphatic and detailed. And Voltaire, in a subsequent age, adopts the same tone. Now, we know that in the days of Comines, the government of England was practically a despotism, and in the days of Montesquieu, that the royal element still maintained its ascendancy. When Voltaire wrote the kingly authority was gradually yielding to the aristocratic, a change which culminated towards the close of the century. Since the reform bill of 1832, the power of the throne as a governing element has practically ceased to be felt—the real power being in Parliament. Amid all these changes, England has maintained its relative superiority over other nations in the freedom enjoyed by its citizens, and the protection afforded to individual rights; a result due, I repeat, more to the morals and manners of the people than to the form of their political institutions. And this naturally suggests the observation, that the merits of a government at any one period, depend not upon any abstract theory

of right and wrong, but upon its comparative advantages or disadvantages when contrasted with contemporary organizations. It is not fair to compare, as is done by DeLolme throughout his treatise, the workings of Roman institutions with the workings of English institutions. The terms of the equation do not admit of a comparative statement. The condition of the world, and the character of the civilization at the two periods, are too unlike. Only governments which exist at one and the same era can be rightly compared, for then alone the intellectual culture, the religious training, and the general morals, are to some extent similar. If you act upon this suggestion, it will be found that the Roman government was as superior to the governments of the same age as the English government has been to its modern contemporaries. Or rather, for this is the true test as it seems to me, the practical workings of the Roman institutions were more effective in attaining the end of all government—the protection and prosperity of the citizens—than those of any other contemporaneous people; and the Comines and Montesquieus of the old world might have truly said that, among the then existing nations, the public affairs of Rome were better conducted, and with less violence to the people, than elsewhere. England, no doubt, deserves the praise she has received, notwithstanding her internecine conflicts, her incessant foreign wars, her, at times, tyrannical kings, and up to a very recent period, her barbarous laws. But how much of the comparative superiority both of Rome and England should be attributed to the particular form of government prevailing at any one time, and how much to the character of the people and other circumstances, is a different question. To me, the mere form of government seems entitled to little weight. Rome passed through the different stages of a monarchy, dictatorship, aristocracy, republic, and autocracy, and yet maintained its relative superiority to the last. So, England has been a feudal kingdom, a limited monarchy, a pure despotism, an aristocracy, and a parliamentary republic, but the conduct of its public affairs and the condition of its private citizens could bear a favorable comparison with those of its neighbors at any given period. The trial by jury was, no doubt, vastly more important, so far as the protection of the citizen was concerned, than either the outward form or the real nature of its government; and the peculiar character of the Anglo-Saxon, modified by climate and locality, more important, perhaps, than everything else.

DeLolme himself, although his whole argument is aimed to prove

that the happy result is due to the form of the government, and, particularly, to its feature of hereditary royalty, frankly admits towards the close of his book (on the last page but one), that time, locality and chance have had much to do in completing the good work: "It is by a fortunate concurrence of circumstances, and I may add, by the aid of a favorable location, that liberty has been able to erect herself a temple. . . . It is there that, freed from the danger of foreign trouble and aided by a happy combination of circumstances, liberty has succeeded in expanding into the form which suits her; and it required six centuries to complete the work." During the greater part of this period, the popular element was certainly the least felt, and a looker on might well attribute all the advantages to its associate elements. DeLolme, accordingly, upholds the royal authority as the *primum mobile*, while Sismondi lays chief stress upon the aristocracy. Montesquieu and Voltaire, particularly the latter, dwell upon the freedom of the press, and the inherent love of liberty of the people, as the true sources of the national prosperity. Certain it is, that, whenever the popular element has prevailed, the machine has moved with fresh vigor and vast amelioration. Never has the English superiority, so far as the prosperity of the people is concerned, been greater than now—when the monarchical element is literally a form, but a form, however, deficient in actual power, not altogether without its advantages. The throne, like the bunting which floats from the national flag-staffs, although it may only be a *simulacrum*, forms a rallying point around which the loyalty of the English heart instinctively clings. The feeling is the growth of a thousand years, and is the warmer now because its exhibition is unattended by any danger. The throne is no longer an object of terror. It is the least dangerous element in the constitution. There may be peril in the increase of aristocratic or popular power,—there is none, every one knows, in the "shadowy crown" of the modern Guelph.

DeLolme considers the great advantages of the English Constitution to consist in:

1. The unity of the executive power in one person, and its entire separation from the legislative.

2. The division of the legislative power into two branches holding by different tenures, one of them independent of the people, the other of the crown.

3. The right conceded to the people, through their representatives, of proposing laws, and of controlling the public expenditures.

He examines, and shows very satisfactorily, that it is not to the

interests of public liberty that the people should have a voice directly in the passage of every law. (See B. 2., c. 5.) Like Sismondi, he sees the necessity of protecting the people from the consequences of their own rashness and want of thought. He is decidedly of opinion that the power of the people in legislation should be confined to the selection of a representative, the latter being left free to act for the interest of the whole nation, guided by the lights growing out of his position. His treatment and illustrations of this point are admirable.

The first advantage above enumerated of the English Constitution, exists only in name. By the principle of the responsibility of ministers for the acts of government, and the right exercised by Parliament of changing the ministry whenever the existing members no longer have their confidence, the legislative has, in reality, absorbed the executive. It is true, that if this state of affairs should be found eventually to work badly, either the aristocracy or the people might rally to the support of the throne, and restore the equilibrium upon which DeLolme so fondly relies. But the extent of the commotion thus produced, and the result of the struggle would depend more upon the character of the people than upon any supposed influence of the constitution itself. The same movement which in France might be attended by violent outbreaks and the slaughter of thousands of victims, might produce among the phlegmatic English, the dull Hollander, or the sluggish German, only a few public gatherings or mobs less destructive of life than the joyous crowd which thronged the streets of London at the recent entry of the Prince of Wales and his intended bride into this mighty metropolis. Let me repeat, therefore, that more is due to the peculiar character of the Anglo-Saxon race in the formation of the present English Constitution than DeLolme is willing to admit. In other words, I reverse his position and insist that institutions are the growth of the morals and manners of the people, not the morals and manners of the people of their institutions. And I attribute the happy workings of the English government not to its form, but to its people. The same institutions with the Celtic race of Ireland, France or Spain, would have fared very differently. "Nothing is more superficial," says DeTocqueville in his *Ancient Regime*, p. 267, "than to attribute the greatness and power of a people to the sole mechanism of its laws; for, in this matter, it is less the perfection of the instrument than the force of its motive powers which produces the result."

DeLolme's summary of English civil and criminal law, and his

parallel between the province of the Courts of Equity and the jurisdiction of the Roman Prætors, are masterly. His sketch of the Roman *actiones leges*, and of the edicts of the Prætors, is neat and accurate. (B. 1., ch. vii-viii-ix-x.) He shrewdly suggests that the English, by refusing to adopt the Roman law, so frequently pressed upon them by the Ecclesiastical Chancellors, were compelled to go through the same process as the Romans themselves, and to invest the Courts of Equity with power to soften the rigors of the common law. He adds, that the English lawyers err when they attribute the liberty of their nation to the rejection of the civil law. This, he says, is to take the effect for the cause. It is not because the English rejected the Roman law that they are free; it is because they were free, or, at least, because they had among them causes which would in the end establish liberty, that they rejected that law. Even if they had admitted it, the same causes would have led to the rejection of those parts which tend to the curtailment of freedom. This was sufficiently evidenced by the example of Germany, where, although the Roman law was adopted, the imperial precept prefixed to the Institutes, "*quod principi placuerit, leges habet vigorem*," never was in force.

The feudal system at one time prevailed all over Europe, England inclusive, with remarkable uniformity. The people, at that time, possessed a portion of political power, for they held feuds under their immediate lords upon the same terms as the lords held under their suzerains. The inferior feudatories as contradistinguished from the serf (the hewers of wood and drawers of water), were bound to assist their lord in time of war by military service, and to aid him in time of peace by attending his courts and joining in the administration of justice. In the villages, the local officers were usually elected by the people, and in the larger cities the different guilds and professions exercised franchises similar to those enjoyed in our days. Large privileges were by royal charter frequently conferred on burghs. The freedom of a city was, at that day, something more than a mere form. England then started upon no better vantage ground than her feudal neighbors. Each had De Lolme's necessary elements to success—kings, lords and commons. But how happened it that the same institutions have led to such different results in different countries? It is upon that point that the superiority of DeTocqueville to DeLolme is strikingly conspicuous. The latter points out the superior workings of the English constitution, attributing them to the mere combination of forms.

DeTocqueville goes below the surface, and exposes some of the causes which have led to particular results. In his *Ancient Regime*, he traces the decline of the feudal system and shows that on the continent, the course of events was to deprive the inferior feudatories of their local franchises, while in England these franchises were preserved and gradually enlarged. The consequence to the continent was, that the people having lost all political importance, the nobles had no inducement to cultivate relations with them, and the line of distinction between the two grew more and more marked, dependent merely upon birthright, until the nobility and the *roturier* became mere castes, as well defined as those of India. On the contrary, in England, the retention of specific franchises by the people prevented the formation of the impassable gulf between the different orders which is the result of caste. The true secret of English success, then, lies in the fact that the people continued to retain the power which the feudal institutions gave them, until the spread of intelligence enabled them to demand and receive an accession of power. While, on the other hand, the people lost all influence on the continent, and when the progress of civilization enabled them to realize their position and their rights, the change necessary to acquire the latter could only be obtained by force. It will be seen, therefore, that DeTocqueville goes deeper into the subject, although incidental to his theme, than DeLolme. But even he does not undertake to ascertain why the political power of the people should have been retained in England and not on the continent. Was it mere chance? Was it climate and location by modifying the character of the people? Has the government everything, and nature nothing to do in the result? My own opinion is, I repeat again, that the result is due more to the qualities of the race under the influence of locality and climate, than to any institutions whatever. I agree with M. DeTocqueville in the views which he gives to his friend M. Corelle, in a letter dated 17th September, 1853: "You understand enough of my ideas to know that I accord only a secondary influence to institutions upon the destinies of men. . . . I am thoroughly convinced that political societies are not what their laws make them, but what they are prepared in advance to be by the sentiments, the beliefs, the habitudes of heart and spirit of the men who compose them, and that nature and education make these latter." The same thought in substance is thus differently expressed by Sismondi: "No science, in reality, ought to be modified according to circum-

stances so much as the theory of constitutions, for the Legislature should act solely upon the political body which is given it; but which it does not create. Peoples exist, the legislators do not confer upon them life. Peoples exist, and each people has a constitution in the largest sense of the term since it exists. The Legislature ought to touch this constitution with the file, never with the hatchet."

The principal differences between the English and the French government are :

1. The English have much liberty with great inequality of rank, while the French have little freedom and absolute equality.

2. Both have a hereditary sovereign, a permanent senate, and a popular legislature, but the sovereign in England is a cypher and the legislature supreme, while the sovereign in France is supreme and the legislature a cypher.

3. Strangely enough, too, the powerful legislature is elected by only a fraction of the people, less than a sixth, while the legislature without power comes in under universal suffrage.

4. Strangely, also, the hereditary senate of the one has far less direct power than the senate for life of the other. The power of the House of Lords in England is not in its legislative capacity, but as an aristocracy, and this latter depends upon the consent of the people. In other words, the English government is an aristocracy, not from the direct legislative and executive power conferred by the constitution upon the nobility as a class, but from the tacit consent of the body of the people.

5. The press and trade are free in England, while both are held in administrative restraint in France. (I notice in the French papers this morning that two coachmen have been deprived of their position, the one because he wore a blouse, and the other because he smoked on the box. From one specimen brick, judge of the whole edifice.)

6. The French government is powerfully centralized, so that nothing can be done in the most remote province without the consent of the Bureaus at Paris. In England there is no such interference in local affairs, which are left to be regulated by the people interested.

The superiority of English institutions is to be traced, then, not to the form of its government, but to the character of the people, the liberty which is therefore entrusted to them, and the education and training which they derive from the exercise of local franchises.

The happiness of the people alone may be found, at times, in a despotism, but their happiness and progressive improvement combined can only be secured by institutions which, while they foster the material interests and internal quiet of society, keep alive, at the same time, the public spirit, and improve the capacity of the people for self-government. Between the quiet and stagnation of despotism, although accompanied by all the fostering care of a paternal administration, and the agitation and incessant activity of a democracy, although attended by occasional outbreaks (or, to use Mr. Jefferson's expression, "by the occasional watering of the tree of liberty with blood"), the far-seeing statesman must prefer the latter, as most to the advantage of a nation in the long run. No writer has more fully and clearly developed this advantage of free government than M. DeTocqueville. It lies at the root of all his predictions for free institutions. He was not unconscious of the temporary evils, but deemed them largely overbalanced by the benefits. He is very emphatic in urging the necessity of educating the people to self-government by entrusting to them the control of their own local affairs. He considers, and with reason no doubt, that the exercise of this power by the English, in connection with the education received through the instrumentality of the jury system of trial, has enabled them to enjoy freedom without abusing it. It is by the practical experience thus acquired that the young and enthusiastic are taught to regulate theory by fact, and to yield their individual convictions to some extent for a common end. If we come to the exercise of franchises affecting the whole nation without any such preliminary experience, we are apt to lay too much stress on our own (to us) high ideals, and think, like the Catholic church, that everything must yield to us. Much of the radicalism and fanaticism of the French mind may be attributed to the total want of any similar training. The English education of a thousand years would, no doubt, have greatly benefitted them, but I am afraid it would require another thousand years to perfect the work.

The House of Commons is, I have said, elected by only a fraction of the adult male population, while the French Legislative body is elected by universal suffrage. In the former case, however, the franchise is entirely free from governmental control, while in France the government has its candidates and brings all its influence to bear to ensure their election. This is not the only difference. In France the electoral districts are strictly proportioned to population, one for every thirty-five thousand. This is

not the case in England, and, of course, could not be, for in many of the manufacturing towns the persons possessed of the necessary property qualification are very few in comparison with the mass of operatives. Accordingly, such proportioning is there the exception and not the rule. Previous to the reform act, there were boroughs where the elections were controlled by half a dozen votes, the right to a representative having been conferred centuries ago, when the borough was flourishing and populous, and retained after the population had gone to a more favorable spot. The same anomaly, though to a much less extent, still exists. The representation of cities is very unequal, and not governed by any definite rule. Sometimes, the franchise in a city depends upon a property qualification, sometimes on mere citizenship. The universities are represented by persons elected by their officers, stipendiaries, and graduates. Sismondi is a decided advocate of some mixed mode of representation, and is greatly opposed to universal suffrage on the basis of population. This last mode, he insists, sacrifices principle to uniformity, and is the worst of all possible modes—for it throws the whole power into the hands of one class, the ignorant, who are always the majority in any given community. The ancients, he says, knew better than this, for they divided the people into tribes or centuries, massing the bulk of the laboring population into a few of these divisions, and then giving the vote not to the individual but the collective bodies. Even in the middle ages, when the people enjoyed more freedom and more political privileges than now, the same course was pursued. In Florence, for instance, all classes had a voice in the government, but it was by the election of representatives by each class separately. Each guild, or fraternity of workmen in a particular trade, chose its own representative. The universities, the farmers in the country, and the well-to-do *bourgeoisie* of the towns, elected representatives separately. At the same time the clergy and nobility were entitled to their representatives. In this way all classes had a voice in public affairs, whereas now only one class has—the majority—the vicious and ignorant. Why may we not, he asks, return to the better practice of the past, with the modifications required by modern civilization? The learned professions, in a particular district, might each elect a representative, the owners of property in the same district, another, the laborers without property, another. In this way all classes will be represented, and the right to which they are entitled will be given to intelligence and property. "Experience has taught us," says

Sismondi (*Etudes Sur les Const. des Peuples Libres*), "that power, and especially absolute power, corrupts all who exercise it. It makes kings, who are active, proud, presumptuous and cruel; if indolent, voluptuous. Power renders aristocracies exacting, jealous, and implacable. The people can not escape this corruption. When the sovereign power is entrusted to them, they are not less vain or proud than other sovereigns, nor less greedy of flattery, nor less impetuous in their resentments, rash in their aggressions, and implacable in their vengeance. The character of each citizen in a democracy feels the influence of this continued abuse of power, of that drunkenness of flattery, and of the abandonment to the violent passions, which the intriguers and sycophants are incessantly endeavoring to arouse. In its turn, America is there to justify the theory." Alas, well might he say so even when he wrote, and with how much more truth now! M. DeTocqueville is equally aware of the practical evils of universal suffrage, the remedy for which, however, he looks for in multiplying the intermediate elections. He is also, as we shall see, equally energetic in the language which he uses in reference to the tyranny of majorities. The problem of conferring equal political rights on every member of the community, and at the same time providing sufficient protection for the minority, is one of vast importance to the "democratic eras." Mr. Calhoun is the only one of our American statesmen, since Mr. Jefferson, who has given the subject a thought, but it is doubtful whether his theories admit of practical application. Mr. Jefferson's suggestion seems to me the best which has been made, and that is that legislation, except in the laying of taxes, etc., should be conferred not upon a bare majority, but upon two-thirds, three-fourths, or some larger number of the representative body.

M. DeTocqueville in a letter to N. W. Senior, of England, under date of April 12, 1835, has thus explained the scope and object of the Democracy in America: "I have sought to establish the natural tendencies which the social democratic state gives to the spirit and institutions of man. I have pointed out the dangers which attend humanity on this route. But I have not pretended that we may not struggle against these tendencies, discovered and resisted in time; that we may not avoid those dangers seen in advance. It has seemed to me, that democrats themselves (and I use the word in its good sense), did not see clearly either the advantages or perils of the state towards which they sought to direct society, and that they were thus exposed to mistake the means proper to render the first

as great, and the second as small as possible. I have, therefore, undertaken, with all the firmness of which I am capable, to bring out distinctly the one and the other, in order that we may look our enemies in the face, and know against what we have to struggle. M. Jouffroy points out the perils of democracy, and considers them as inevitable. In his view, all we can do is to postpone these dangers as long as possible, and, when they come at last, to cover the head with our mantles and submit to destiny. As for me, I wish society to see these perils, as a firm man who knows that perils exist to which he must be subjected in the attainment of a proposed end, and who exposes himself to them, without pain and without regret, as to a condition necessary to his enterprise, and only fears them when he does not see them in all their magnitude." For this purpose he undertook to study and explain the existing social democratic status of America, and to ascertain how it had been reached, and what were the probable future tendencies, social, intellectual, and political, of the elements at work. The task was assuredly a high one, and, if the author has failed in any respect to attain the end aimed at, he is certainly entitled to claim that he has conceived and pursued his enterprise in the spirit which deserved success. The reader can not question his impartiality, nor fail to admire the courage with which he discloses the evils as well as the advantages of democracy. His predecessors, aye, and his successors, have been either eulogists, or outspoken foes of popular institutions. He alone has honestly held the scales, and fearlessly weighed the principles and their results.

The manner in which M. DeTocqueville treats his theme, will be best understood by a brief outline of his plan. He first describes the geographical configuration of North America, and particularly that portion of it embraced within the limits of the United States. Then, he traces rapidly the history of the Anglo-Americans, and shows how their laws, and customs, and social state, tended essentially towards democracy. He, next, turns to the political forms of organization, and, commencing at the starting point of a single neighborhood, follows the existing system from the commune, township, or district, through the County and State, up to the General Government. In his progress, the independent and uncentralized character of the American institutions, both of the State and Federal Government, is necessarily dwelt on. The power of the judiciary, and its influence on the body politic, is also discussed. When he comes to the national government, after an admirable analysis of

its parts, he designates the characteristics which distinguish the United States Federal Constitution, from all other Federal Constitutions, while explaining the advantages of the federative system in general, and its special utility for America. The peculiar distinction, in his opinion, between the American federation and all other federations, is, that it undertakes to make the Federal Government complete within its sphere,—that is, capable of acting directly upon the citizen, instead of indirectly through the different members of the confederacy. This advantage he considers invaluable. In this connection, he suggests that the government is not strictly a confederation, nor can it be said to be altogether national. It is, in fact, an incomplete national government. The disputes between the Federalists and the Republicans as to the form of government—whether federal or national—(like so many other disputes in this world) are about words. The government is strictly neither federal nor national, but a mixture for which there is no name. “Human (*esprit*) nature,” he says, “invents things more easily than words; whence comes the use of so many improper terms, and incomplete expressions. Several nations form a permanent league, and establish a supreme authority, which, without acting on the individual citizens as a national government, has, nevertheless, an action upon each of the confederate peoples taken in a body. This government, so different from all others, receives the name of federal. A form of association is then found in which several peoples unite actually into one as to certain common interests, and remain separate and confederate only as to all others. Here (in the United States), the central power acts without any intermediary upon the governed, administers and judges them itself, as do national governments; but it acts thus only in a restricted circle. Evidently, this is no longer a Federal Government—it is an incomplete national government. Thus, a form of government is invented which is not exactly either national or federal, and there the matter rests, and the new word which ought to express the new thing does not yet exist.” (Vol. I., p. 267.) Whether the national or the federal element ought to be favored, is another question altogether. It is very obvious, however, that the more nearly, by any such tendency, you approach either extreme, the greater violence you do to the common part. Whatever may be our abstract theories of the best form of government, the only guide we ought to look to is the Constitution itself. And, inasmuch as that instrument expressly stipulates that whatever powers are not delegated to the United States nor pro-

hibited to the States, are reserved to the respective States, or the people thereof, very little latitude of construction is fairly left. A great deal of latitude may be unfairly taken, but that will be due to the power of the taker, not to the contract itself.

One of the great advantages of the federative system is that it combines the benefits of small and great States. Nations embraced within a small territory have the advantage that the eye of society penetrates everywhere, and the spirit of amelioration descends even to the smallest details. The ambition of the people being greatly tempered by their feebleness, their efforts and resources are turned almost entirely towards internal affairs, and are not subject to be dissipated in the vain smoke of glory. Moreover, the equality of condition and oneness of interest of all classes of citizens are more likely to be preserved, and general laws may be safely enacted without the fear of injuriously affecting particular classes or localities. Besides, the independent State organizations enable each part to resist more successfully foreign invasion, and to prevent internal conspiracies. On the other hand, great empires favor the development of civilization, give a broader and higher tone to the intellect, and have the advantage of force, which, alas, is often the first element of prosperity. The federal system in the form which it has assumed in the United States has, says our author, all these advantages combined. The local State governments give to each member of the Confederacy the benefits of small nations, while the general government has all the power of a great empire. The Union is free and happy as a little nation and respected as a great.

Having thus prepared the way by these geographical, historical, and constitutional preliminaries, which occupy the first volume of the original edition of his work, our author begins his minuter analysis by showing how it may be literally said, that in the United States the people govern. This result is produced by the frequency of elections, and by the prevailing practice (which our author does not hesitate to condemn), of determining in advance, by means of a party platform, the course of action of the representative on all important measures. In this way, all the advantages to be derived from the superior intellect of the representative, and from the free interchange of thought in the clearer atmosphere of legislative deliberation, are effectually lost. In theory, the person elected may be the representative, but in reality he is only the delegate of the people. In a letter to John Stuart Mill, written on the 5th of December, 1835, M. DeTocqueville, after complimenting his cor-

respondent upon the clearness with which, in a recent work, he had developed the "capital distinction between delegation and representation," thus proceeds: "The question for the partisans of democracy is far less to find the means of conferring upon the people the power of governing, than of enabling the people to choose those most capable of governing, and of giving them over the latter an empire sufficiently great to enable them to direct the totality of their conduct, and not the details of their acts nor the means of execution. This is the problem. I am perfectly convinced that upon its solution depends the lot of modern nations."

Our author next devotes a chapter to the political parties of the United States; another to the liberty of the press; and another to the liberty of political associations. He then treats of the mode of government of the democracy in America, a subject of vast extent, in which, among other things, are included the doctrine of universal suffrage, the instincts of the people in the choice of representatives and officers, the arbitrary power of these functionaries, the instability of administration, salaries of officers, public expenses, official corruption, conduct of external affairs, etc. A chapter is next devoted to the real advantages which American society derives from the government of the people. The following chapter (VII.) treats of the omnipotence of the majority and the consequences; and this is succeeded by another showing in what manner the tyranny of the majority is tempered. The next chapter treats of the principal causes which tend to maintain the democratic republic in America. The last chapter of the second volume is devoted to the actual state and probable future of the three races which inhabit the territories of the United States, and is marked by a spirit of fairness wonderful for a Frenchman, and worthy of one of the profoundest thinkers of modern times.

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## *Opening the Biddings—Click vs. Burris Reviewed.*

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The Supreme Court of Tennessee, at its Knoxville Term, 1871, in the case of *Click vs. Burris*, not yet reported, gave an opinion on the subject of opening the biddings at Chancery Sales, which deserves a careful examination, because of the importance of the subject itself, and the retrogressive character of the doctrines of the opinion. It was an administrator's bill to sell lands for the payment of debts. The widow of the intestate and her son-in-law were purchasers at an inadequate price, and before confirmation of the sale, creditors objected by petition, stating that the sale took place at the court-house, twenty miles from the land, in an inclement season, when the roads were in a very bad condition for travel, and when it was not generally known in the neighborhood that the sale was to take place. They assigned reasons not given in the opinion for being unable to attend; stated that they were not made parties to the bill, and offered an advance of about 100 per cent. The Chancellor refused to open the biddings, but the Supreme Court reversed his action. Nelson, J., delivering the opinion of the Court, among other things, said:

“The uncertainty of any rule as to the opening of biddings, is as much calculated, if not more, to deter persons from bidding for property than a fixed rule to which all can conform their action. All persons can be fully apprized by the course of decision in this State that their purchases require confirmation and may be set aside; but under existing circumstances, they are not informed what causes will be sufficient for that purpose. It has perhaps sometimes occurred in practice that sales have been set aside without notice to purchasers, and without their having an opportunity to compete in the new biddings. To guard against this, we think it best to announce as a rule for the future action of this Court, but not to govern sales which already have been made, that we will adopt the English practice, and when it appears that an increase of bid of ten per cent. has been offered, the biddings will be opened. This rule will be applied in cases where the proposal to open the biddings is made at the term of the court to which the report of sale is made, and where it appears that notice of the intention to

make the offer has been given to the first bidder or purchaser; and when the rule is applied, the property will be put to sale at the increased bids, with open competition to all other bidders, and when the re-sale is made, the biddings will not again be opened except under extraordinary circumstances."

This reads RATHER more like an act of Parliament than a declaration of law by a Court of common law judicature upon a given state of facts. It may first be said of it, that it is an attempted exercise of a power entrusted by the Constitution to another department of the Government, which is not only forbidden by that instrument (Art. II., § 2), but was condemned by the court itself in a noted case, where the usurpation was that of the judicial function by the legislature: *Jones vs. Perry*, 10 Yerg., 59. The restrictions imposed by the above cited provision of the Constitution have always been rigidly enforced by the Supreme Court (T. & S. Code, p. 87), and it would be a matter of regret if that exalted tribunal should ever come to feel the restraint irksome to itself. It can not be pretended, that this is an exercise of the ordinary power of the Supreme Court to prescribe for itself rules of practice, and as it has no power to make rules of practice for inferior courts, the right to declare this "fixed rule," must be founded in the judicial power to declare the law which governs the case in judgment. The matter of opening biddings is in no other sense a *rule of practice*, than any other exercise of this judicial power, and the Supreme Court would have the same authority "to announce as a rule for the *future* action" of the court any other series of regulations, as minute as those contained in the above quoted extract.<sup>1</sup> The court could declare, that on the facts made out the law required the biddings to be re-opened, but to prescribe a rule to govern *future* cases, not yet before the court; to regulate the advance of bid to be required; the notice to be given; the time at which the application should be made; the

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<sup>1</sup> If it is a "Rule of Practice" the power to make it is in the Chancellors themselves: Code 3935, 3936. And when made it is binding like a statute on the Supreme Court as on others: *Lanum vs. Steel*, 10 Hum. 280; *Maultsby vs. Carty*, 11 Hum., 361. Rules of decision which become rules of property are more inflexible than others: 1 Bl. R., 123; 2 P. Wms., 258; 2 Bro. C. C., 86. The doctrine extends to a "practical rule of property:" 1 Kent, 478. The distinctions taken between what are mere matters of practice and rules of property, are often subtle and refined. The cases under the Federal Judiciary Act afford examples: 1 Kent, 342, notes.

Mr. Daniell gives the subject of Practice a very broad definition, and it is evident that he discusses subjects of jurisprudence in a more enlarged sense than a technical definition of his title would justify. Mr. Story, in *Equity Pleadings*, § 4.

mode of making the re-sale; and to prohibit more re-sales than one, would seem to encroach somewhat on the proper functions of a legislator.

An able political writer, in this country, reviewing the recent events which resulted in the overthrow of Mr. Gladstone's Ministry, directs attention to that conservative habit of public opinion in England, which refuses to tolerate any reformation of the laws which is bred only in the brain of the reformer himself and not indicated by the national will. He says: "A striking product and illustration of this peculiarity is to be found in the mode in which English judges are compelled to exercise their extraordinary powers of legislation—powers such as the judges of no other country but this possess. They are allowed to decide very knotty points without the help of Parliament, but they are sternly prohibited by immemorial custom from deciding any point not raised by the case before them, *or laying down any general rule*. In short, they are compelled to let everything alone but one; and this hostility to generalization has entered so deeply into English habits that the term 'jurist' as applied to an evolver of legal principles, is at the English bar almost a term of ridicule or reproach." (The Nation, vol. 18, p. 102.) The italics used here are to point the moral, and it may be permitted to say, further, that if *Click vs. Burris* had followed *this* "English practice," the opinion would be more in accordance with the almost uniform practice of the court and the eminent character of its judges.

The idea of "endeavoring to lay down something like a general rule upon this subject" once occurred to Lord Commissioner Ashurst, in *Watson vs. Birch* (2 Ves., 51), and he took time to consider, but when he gave judgment he declared, with manifest disgust, that it was impossible "*to extract from the cases*" any confirmed rule. The learned judge in *Click vs. Burris* did not endeavor to "*extract*

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5, takes the distinctions between Pleading and Practice, and defines Practice as the "conducting a suit in equity." Thus confined the Chancellors may, no doubt, by rule regulate the mode of making applications for re-sale, and the like, but not the "precise circumstances" under which such applications are to be granted or refused, nor the causes for which biddings will be opened. The Supreme Court of Tennessee, in theory at least, has insisted on uniformity, and condemned "capricious and uncalled for fluctuation in judicial opinion and decision." 9 Yerg., 247; King's Dig., § 11,014. It is said in *Thompson vs. French*, that, "upon a point of practice, we would not unsettle an adjudicated case of our own Court, even though we might think if it were a new question, we would have settled it otherwise." 10 Yerg. 458. But this was in 1837.

from the cases" a "fixed rule," deterred perhaps by the failure of the former experiment, but in terms pretermitted any critical review of them, and essayed the easier task of announcing a rule for the control of *future* cases, with the usual statutory saving clause for "sales heretofore made," as to which it is enacted that this fixed rule shall *not* apply. What rule is to govern those unfortunate cases? A rule constructed on Lord Commissioner Ashhurst's plan would have been without this fault, and would apply to any case within it, whether future or past. No reason is apparent why *Click vs. Burris* should not have prescribed some suitable rule for sales *theretofore* made, as well as those to arise *thereafter*, if the one laid down was inapplicable. The power of the court was the same in either case.

One of the most discouraging effects of this rule is, that it deprives the Chancellor of all discretion in the matter of these applications; and another is, that it omits to provide indemnity for the purchaser by a speedy restoration of his money, notes, or other securities, and the payment of his costs, counsel fees for examination of title, and other losses. This latter was a prominent feature of the English cases, and if they had been examined would scarcely have been omitted by a careful law-maker, whether on the Bench or in the Assembly hall. In England the purchaser was allowed out of the new fund for these losses, and interest on the whole of his bid, the court being inclined, in justice to the bidder, to push these allowances to an extreme length: 1 Sug. Vend., 168 (8th Am. ed). In the case of the *American Insurance Company vs. Oakley*, 9 Paige, 259, it was laid down as a limitation of the doctrine, that relief by re-sale would be given only so far as it could be done without positive injustice to a *bona fide* purchaser. Heretofore, the cases have refused to limit or confine the discretion of the Chancellor by prescribing rules, and have left each case to be determined on its own circumstances. This is so with the English cases, and notably so with those in Tennessee. Everywhere the power of the court to *refuse* the application, in its discretion, is as fully recognized as the power to *grant* it. It will be found on examination of the cases cited by Lord St. Leonards, in his chapter on this subject, that the whole matter was left to the sound legal discretion of the court, which was to so exercise its power as to insure the largest price for the property, protect the purchaser, and preserve public confidence in the contracts of the Master: 1 Sug. Vend., 161. The attainment

of one of these purposes was as much the duty of the court as another, and, considered as a matter of policy, we have the highest authority declaring, that, generally, the highest price will be obtained by insuring an entirely fair sale, and after it is made preserving it inviolate. But, whatever may be the true policy for the government of the discretion of the court, it is manifest, that it is disastrous to the interests of all concerned to take away the discretion itself. In the very nature of the subject, it is an inherent necessity, that this control of the court over each case must be sustained, and "fixed rules" are impossible. If it is to be otherwise, there is no hope of anything but constant injustice in the application of any rule. The language of *Click vs. Burris*, is too mandatory and imperious, to allow of any exercise of this wholesome discretion by the Chancellors, who have now nothing to do, but to comply with it in all "*future cases*," unless, happily, some of them shall be found independent enough to investigate the subject for themselves, and courageous enough to repudiate the rule as one *ultra licitum*. There can be no exception to the case as an adjudicated precedent, and as such it is a valuable one, but beyond this its authority may, with propriety, be called in question.

The mode of distorting a case, where the advance of bid was "more than one hundred per cent.," into a decision that the law of Tennessee is, that in all future cases an advance of ten per cent. shall be sufficient to re-open the biddings, can only be learned by an analytical study of the case itself. The more important concern is with the soundness of the doctrine. It might reasonably be expected of one about to engage in the grave duty of overruling former adjudications, and preparing the way for a new rule of action by the adoption of a given practice, that the prior cases and the practice which it was proposed to adopt should be critically and carefully examined. This opinion bears no impress of such an examination, but on the contrary it is heroically declined. There is no want of citations to previous cases, but they are only made to serve a predetermined purpose to disregard them, as if the reformer, instigated by what had "sometimes occurred in practice," had preconceived the idea that the reformation was a needed one, and this was the first opportunity to effect it. The learned judge cites no authority for the rule he declares, and assumes it to be the "English practice," which it certainly never was as a "fixed rule," if we are to find it in the adjudications. And, it is a singular fact, that at the time THE RULE of *Click vs. Burris* was

promulgated for the first time in Tennessee, or anywhere else; the "English practice" referred to, and adopted, had been in 1802, in *Andrews vs. Emmerson*, 7 Ves., 420, expressly overruled by the Lord Chancellor; had been virtually superseded by the new system of reserved bids, prescribed by the general orders in 1851 (1 Sug. Vend., 136); and had been in 1867, four years before *Click vs. Burris*, entirely abrogated by act of Parliament (Stat. 30 and 31 Vict., ch. 48, § 7), because of its pernicious character and often lamented effects on Chancery sales: 1 Sug. Vend., 161, 163, and notes; 2 Danl. Ch. Pr. (4th Am. ed.), 1285, notes.

It could not fairly be expected that the court would adopt the improved system of reserved bids, but there was no reason, under such circumstances, imperatively requiring it to engraft on one jurisprudence the diseased and obsolete practice announced. If it was a matter of choice, the power to choose being assumed, the modern English practice presents advantages not possessed by the other.

The case of *Garstone vs. Edwards*, 1 Sim. and Stu., 20, is the one almost universally cited as the authority for what is called the ten per cent. rule. It was £350 on £5,300 and was refused. Vice Chancellor Leach said in that case what follows:

"It is true the court does not confine itself to a particular rate per cent., *although ten per cent. is a sort of general rule*. The cases establish, that where an advance so large as £500 is offered, the court will act upon it, though it be less than ten per cent." . . . .

The same judge refused less than £40 on a sale of only £91, in *Brookfield vs. Bradley*, 1 Sim. and Stu., 23, and in *Farlow vs. Weildon*, 4 Madd., 243, refused £30 because it would not pay the cost of advertising the sale, which contingency is not provided for in *Click vs. Burris*.

Mr. Fonblanque urged, *arguendo*, in *Upton vs. Lord Ferrers*, 4 Ves., 700, that formerly an advance of ten per cent. was not thought sufficient, and, *per curiam*, *ten per cent. upon a small sum is not sufficient*. The case of *Click vs. Burris* makes no distinction in this regard. In *Andrews vs. Emmerson*, 7 Ves., 420, the advance offered was *exactly* ten per cent., and Lord Eldon held, as follows:

"That rule of ten per cent. was not a wise rule to establish. The consequence is, you never get more. I remember the time when no such rule prevailed; and I desire it to be observed, that in future there shall be no such rule."

This was just twenty years before *Garstone vs. Edwards*, and

Vice Chancellor Leach simply overlooked it in that case, the point not being before him.

In *White vs. Wilson*, 14 Ves., 151, Lord Chancellor Eldon said again: "My opinion has always been that ten per cent. will not do as a rule. In some cases, I should take that advance; in some, I shall be satisfied with less; and in others, I shall require more." And he here refunded £500 upon £10,000.

Mr. Sumner, in his note in 2 Ves., 55, citing *Andrews vs. Emerson, supra*, says, "THIS CASE PUT AN END TO THE TEN PER CENT. RULE." Mr. Hovenden, in his note to Anon., 1 Ves., 453, says, "where it is proper to open the biddings, the court does not confine itself to an advance of any particular rate per cent., although ten per cent. is a sort of general rule," citing *Garstone vs. Edwards*, and using almost its language.

Mr. Daniell sums up as a result of the cases, that "the court considers, in ordinary cases, ten per cent. a proper deposit to be made when biddings are opened:" 2 Ch. Pr., 1288.

Lord St. Leonards, however, who is always cited with confidence in his accuracy, and of whose work on Vendors and Purchasers it has been said, that "it possesses almost the authority of a judicial decree," does not so understand the result of the English cases. He says: "Mere advance of price, if the certificate of the purchaser being the best bidder, is not absolutely confirmed, is sufficient to open the biddings, . . . if a sufficient advance be offered; but the court will stipulate for the price, and not permit the biddings to be opened upon a small advance; and, although an advance of ten per cent. used generally to be considered sufficient on a large sum, yet no such rule now prevails; but ten per cent. has been accepted upon a sum under £1,000; and in the case of a sale under a creditor's suit, the court permitted the biddings to be opened, upon an advance of five per cent. on £10,000. An advance of £250 upon £5,300 was refused, and it was said that the former cases only established that where an advance so large as £500 is offered, the court will act upon it, though it be less than ten per cent. But in a late case, £300 was accepted on £5,030, and £365 (being five per cent.) on £7,390. Biddings, it seems, will not be opened unless £40 at least be offered in advance . . ." 1 Sug. Vend. (8th Am. ed.), 163, 163.

In *Childress vs. Hurt*, 2 Swan, 491, the Supreme Court of Tennessee itself uses this language: "With respect to the advance which ought to be decreed sufficient to require the biddings should be

opened, no very definite rule can be laid down; this must be left to depend in some measure, on the circumstances of the given case." It is obvious, therefore, that the author of this opinion has misconceived the English practice, and that nothing like a "fixed rule," as to the rate of per cent., *can be extracted from the cases or authorities on the subject.*

It has been before remarked that this case of *Click vs. Burris* is unexceptionable as a precedent. It falls within the ruling of almost any of the Tennessee cases as to the sufficiency of the "other circumstances" required to justify the Court in opening the sale for an advance of price, and finds a direct precedent in *Roberts vs. Roberts*, 13 Gratt., 639, as cited in note to 1 Sug. Vend., 167, where a sale was vacated because it took place in an inclement season and bidders were not present. However the Courts may differ as to the precise circumstances required,—and upon such a subject the idea of a rule is as irrational as if a rule were made to define what precise circumstances shall constitute fraud,—it is agreed, that they must be such as renders the sale under the given circumstances *unfair*, or, as some of the cases put it, make it inequitable to confirm it. This is the *principle* adjudicated and its application may well be left, as in other cases, to the discretion of the Courts. And, it is novel logic to say, as does *Click vs. Burris*, that because the Courts can not or have not pointed out *precise* circumstances to govern "future cases," therefore, there shall be *no* circumstances required at all. And then by its own rule, it proceeds to limit and confine the Courts, as is done in the opinion, not to a principle of law, or rule of action, to govern them in determining what *sales* they shall re-open, but solely to the *mode of practice* in re-opening such as they are commanded by the rule to set aside. What had the Court to do with future cases, or their precise circumstances, that a rule should be prescribed for them?

All the importance of the opinion rests in the fact, that it would have been competent for the Court to have disregarded all the circumstances of the case in hand as wholly immaterial, as they were under its judgment, and to have declared as its ruling, that in its opinion the law of the land is, that whenever there is an advance offered of ten per cent. the biddings shall be *invariably* re-opened. It has been seen that there is no authority whatever in the practice referred to as its origin for such a ruling; that it was unnecessary for the determination of the case to make it, if there were such authority, is plain, because there were in the case "other

circumstances," and an advance of largely *more* than ten per cent. Under all the tests for the value of judicial opinion, a ruling so made is worthless as authority: Ram's Legal Judgment, 88-109.

The Court, when it had the opportunity to examine as to the correctness of the ruling, would have no doubt been willing to reverse it, had it not been, that the opinion was written with the purpose of taking a new departure, and deliberately prescribing a *new* rule of law. Courts, where the exigencies of the case demand it, sometimes do this, but, generally, they are careful that the new step shall be well supported in principle and authority and shall lie in the direction indicated by the precedents. On such occasions the opinion in support of the proffered rule bristles with indications of a critical investigation of the subject, and if error is committed the errors of other respectable tribunals are assigned to support it. It is very rarely that such opinions adopt the cast off doctrines of the past which have been uniformly condemned and deliberately abandoned. To reach this result the Court, in *Click vs. Burris*, has intentionally, and it would seem with malice aforethought, overruled its own precedents which had also thoroughly repudiated the rule adopted.

Having assumed the power to regulate the subject by a rule, the Court had available for its consideration several distinct doctrines heretofore prevailing, any of which are perhaps preferable to the rule enunciated.

First, there is the Tennessee doctrine which has been formulated in several cases hereafter mentioned. That rule requires the Chancellor to see *that his sales are fairly conducted, and under such circumstances as to insure the best price*. The precise circumstances, calculated to diminish the price, which will justify him in making a re-sale, are left to his discretion *in each case*. They need not be such circumstances of fraud, accident, mistake, or trust relation of the parties, as would justify him in vacating a private sale; but, it is not a matter of course to open the biddings, *on an advance of a larger sum*, merely on the ground of inadequacy of price; nor must the sale be set aside for slight causes. *They must be of that character calculated to diminish the price and make it inequitable to confirm the sale*. This is about as precise and fixed as it is safe for Courts to make rules to govern future cases, and has the advantage of accommodating itself to any variety of circumstances which can arise, and when it is added, that the cases declare that the Supreme Court should be slow to control the discretion of the

Chancellor in the matter, it is nearly as perfect an enunciation of a law as can be required for permanent use.

Then, secondly, there is the Kent or American doctrine, that the Chancellor will not open the biddings, except in those cases of fraud, accident, mistake, or trust relation of the parties, where, under like circumstances, he would be justified in vacating the sale if it were between private parties: 4 Kent (12 ed.), 192.

Anciently, whether before or after confirmation, the English practice required the Chancellor to open the biddings, *whenever the advance of price was large enough to offer an inducement*, whether there were other circumstances or not, *but there was no "fixed rule" as to the rate per cent*; and it was left in the discretion of the Chancellor to grant or refuse the application according to the circumstances of each case. Ten per cent. was at one time a sort of general rule which was afterwards done away with as unwise. Afterwards, the circumstances had to be very particular to open after confirmation, as, that the owner was in prison; and still later, the circumstances required *after* confirmation had to be such as would avoid a private sale, the advance of price, however large, being only an auxiliary circumstance. This change in the rule did not govern applications made *before* confirmation, which were left as it had been before the change, until the whole practice was superseded on account of its deformities, by the system of reserved bids, now used in England: See 1 Sug. Vend., 161-2; Daniel Ch. Pr., 1285, and authorities cited. Chancellor Kent, and nearly all the American courts following his lead, applied the rule found in the cases of *Morice vs. Bishop of Durham*, and *White vs. Wilson*, hereafter mentioned, to all applications, whether made before or after confirmation, and this is the origin of that doctrine on the subject. When this doctrine, which requires some strictness, as in vacating sales between private parties, was, in the early Tennessee cases, urged on Judge Green, who was more like Kent in his judicial habits than any Judge Tennessee has produced, he refused to follow it. He applied it only to cases *after* confirmation. But when the deplorable English practice was pressed upon his consideration, that learned Tennessee Judge refused, likewise, to adopt that, because, no doubt, it had been so sorely lamented by the English Judges themselves, and had never been approved by anybody. He adopted, in lieu of it, the doctrine laid down in *Watson vs. Birch*, which had been before that time overruled by the cases

above mentioned of *Morice vs. Bishop of Durham*, and *White vs. Wilson*. That case held, that even after confirmation, the sale would be set aside, when there was a sufficient advance of bid, if the circumstances attending the sale were *very peculiar*; that is, of such a character as was calculated to diminish the price. Judge Green applied this rule to all applications before confirmation, leaving the Kent rule to operate afterwards.

It is useless to indulge the regret that Judge Green, for the sake of uniformity, did not accord with the great American Chancellor, for, such regret finds compensation in the satisfaction felt, that he did not follow the "English practice." But what can describe the feeling excited, when *Click vs. Burris* rashly overrules both of them, to resurrect an objectionable and discarded rule, and, while bent on reformation, in adopting it, omits its only redeeming requirement that each case should be governed by its peculiar circumstances in the discretion of the Chancellor; and thus, substitutes for a "sort of general rule of ten per cent.," so long overruled in England itself, this "fixed rule" to govern all future cases? The predominant idea of the case seems to be a desire to construct a law for future government, and the judicial duty of declaring the law of the facts before the Court seems to have been forgotten.

An extensive and detailed review of the cases and authorities, is forbidden by the limits assigned to this article, but the reader if he will examine for himself the cases cited in any chapter of the text books devoted to the subject, will find that the rule of Mr. Justice Nelson's opinion is without a precedent known to the law writers.

It would be unpardonable, however, to leave the views here advanced without a suitable reference to and examination of some of the authorities relied on as a justification of them. The citations heretofore made have been more particularly directed to the consideration of the ten per cent. rule, but may be used as well to show the vicious nature of the whole English *practice* on the subject. It was never satisfactory to the English judges, and has been abrogated in the manner already stated.

In *Williams vs. Attenborough*, 1 Turn. and Russ., 70, Lord Eldon said: "Now no one can be said to have any right to open the biddings since it is always in the discretion of the Court to grant the application or refuse it. . . . During a period of nearly half a century which I have passed in this Court, and in which Lord Apsley, Lord Thurlow, the Lords Commissioners, with Lord Loughborough at their head, then Lord Lough-

borough as Chancellor, and after him the Lords Commissioners, with Lord Chief Baron Eyre at their head, have presided here, I have heard one and all of them lament, that the practice of opening biddings was ever introduced. I confess that I have great doubts myself upon the subject; but after a practice so long established it is not for me to disturb it."

Before this he had said, in *White vs. Wilson*, 14 Ves., 151, that "he could do nothing more mischievous to the suitors than release farther the binding nature of contracts in the Master's office; half the estates that are sold in this Court being thrown away upon the speculation that there will be an opportunity of purchasing afterwards by opening the biddings." The same policy was expressed by the Tennessee Supreme Court, *before the war*, if that circumstance shall be thought to add any weight to its authority. See *Coffin vs. Carruth*, 1 Cold., 194-106. Lord Redesdale considered it of greater advantage to suitors to observe more strictness in opening the biddings, as it would result in better sales: *Fergus vs. Gore*, 1 Sch. and Lef., 350. The practice has been so utterly repudiated in America, that it is believed it does not exist in any State, as formerly used in England, or as promulgated in *Click vs. Burris*. In *Williamson vs. Dale*, 3 J. C., 290, Chancellor Kent said that it did not prevail here, and that it was questionable if the practice of opening the biddings as fully as they did in England was not productive of more injury than good. Chancellor Walworth, in *Duncan vs. Dodd*, 2 Paige, 99, declared that it was essential that purchasers at Chancery sales should continue to retain full confidence in the safety of such purchases; and that they will not, as a matter of course, be disturbed merely because a good bargain has been obtained.

The case of *Collins vs. Whipple*, 13 Wend., 225, declared, that the exercise of the power to set the sales aside for a larger sum, had been long considered of doubtful utility, and is latterly resorted to *only in extreme cases*.

In *Watson vs. Birch*, 2 Ves., 51, it was adjudged that under *very particular* circumstances, as in that case where the owner was in prison, an advance of bid was sufficient even *after* confirmation, which as before remarked, is the origin of the Tennessee rule as now applied *before* confirmation. This was in 1792, and in 1799, in *Cheatham vs. Grugeon*, 5 Ves., 86, the biddings were opened after confirmation where there was no circumstance whatever, except an advance of bid of about twenty per cent.

But in *Morice vs. Bishop of Durham*, 11 Ves., 67, and *White vs. Wilson*, 14 Ves., 151, these cases were overruled, and as to applications after confirmation the same rules of law applicable to private sales was adopted. This is the origin of the Kent, or American, rule, which in most of the States is applied to all sales whether before or after confirmation: 4 Kent., 192; 1 Sug. Vend., 162; 2 Daniel Ch. Pr., 1285. See the Notes.

The annotators, not quite accurately, place Tennessee in accord with the American doctrine on the authority of *Henderson vs. Lowry*, 5 Yerg., 240. That case limits the Kent rule to applications made *after* the confirmation. The House of Lords in *Barlow vs. Osborne*, 6 H. L. Cases, 556, likewise condemn the English practice.

In *Henderson vs. Lowry*, 5 Yerg., 240, the subject first came up in Tennessee. It was an advance of about one hundred per cent. after confirmation. Peck, J., was willing to relieve the owner by adopting the "English practice," and could find "circumstances" in the case to accompany the advance, which shows what he considered the English practice. Catron, J., repudiated that practice utterly, and so did Green, J., but the purchaser was relieved under the redemption laws. The case of *Owen vs. Owen*, 5 Hum., 352, was an advance before confirmation of fifty per cent., and the sale was set aside because the negro sold was sick at the time of sale. Green, J., declined the Kent doctrine, in cases before confirmation, and here first declared the Tennessee rule as above stated. He placed the main reliance against injustice in any case, on the discretion of the Chancellor, and said the Supreme Court should be slow to control it.

Two years later, in *Donaldson vs. Young*, Green, J., delivered another opinion, more fully elaborating and clearly defining his rule to be applied before confirmation. The advance was nearly fifty per cent., and the circumstances were, that the Clerk had refused to postpone the sale on application of a sick guardian. The circumstances were regarded more favorably because it was a partition sale, in which cases the parties are allowed more control over the conduct of the sale than in forced sales. The next case before confirmation was that of *Morton vs. Sloan*, 11 Hum., 278. It was a case of mutual mistake in the number of acres sufficient to justify a bill between private parties. The advance was about twenty-seven per cent. on the price of the smaller number of acres and about eight per cent. on that of the larger.

Green, J., in these cases, re-affirmed *Owen vs. Owen*, and distinguished his rule from that of Chancellor Kent. It is a wise rule, avoiding alike the rigid American and loose English practice. He fully asserted, in these opinions, the power of the court to vacate its sales before confirmation, in answer to the Kent argument, that with us Master's sales have the binding force of private sales, but he did not argue, as some others do, that the existence of that power justified any particular exercise of it which had been determined on.

The fact that the power exists authorizes the court to apply any rule founded in the law, but does not vindicate the adoption of the rule itself. This is the fallacy of every diverse opinion in the State: *Childress vs. Hurt*, 2 Swan, 487; *Click vs. Burris*, Knoxv., 1871, and *Parsons vs. McNickle*, Jacks., 1873. These cases array authorities to show that the power to set aside the sale exists, which no one ever denied in this State, since Judge Green's above cited opinions, and then conclude, that an advance alone is sufficient, for the reason, that it is the duty of the court to obtain the highest price. The English and American cases and authorities which discuss the subject, and which condemn the policy of such an idea as thoroughly as it is possible to do, are overlooked, overruled and disregarded upon such reasoning as this. Not only so, but the latest of these cases actually say that an advance alone of ten per cent. is enough in all cases. So it is, indeed, on such a theory of the subject, and no advance at all is justified in the same way, if it can be made to appear that the sale is for less than the actual value of the property. This can always be done by proof, and an advance bid is not necessary as evidence of the fact. If the price is inadequate, it is the duty of the court to make it bring the highest figure, and before confirmation, the sale is within the control of the court; therefore, it should be set aside. There is no difference in principle, and the reasoning is the same. Indeed, this is the principle of these latter-day cases, that inadequacy of price is *alone* sufficient to set aside the sales before confirmation. The ten per cent. rule is a mere whimsical rule of evidence by which the principle is called into play. It is not because more is offered, but because the property has sold for too small a sum, the court acts. This doctrine may suit a special case, but it is disastrous on the sales generally, drives away customers, and causes the sacrifice of estates where no advance is ever made, and the inadequacy is not made to appear, because, perhaps, no one can be found desirous to advance the bid; or, as is usually the case, if it is the property of minors, guardians *ad litem*, if it

sells for enough to pay their fees, have no interest or means of advancing the bid, nor of hunting up some one to do it, and strangers will not voluntarily interfere with the bargains of their neighbors. It would be a better rule, if inadequacy is sufficient, not to prescribe a fixed rule of evidence, but to act, however it is made to appear.

It is the effect on sales never sought to be re-opened, which is the result of the mischief. Very many bargains are made at these sales, but the applications to re-open under any rule are few. Every man who buys at a sale expects to get a bargain, or he would not buy. If the sale is fair, perfectly so, there is no reason why he should be defeated of his bargain, unless the inadequacy is such as will shock the conscience; and a Chancellor must have a tender one if a ten per cent. difference always shocks it. Stability in the sales invites bidders, secures competition, and inspires confidence. Judge Green's rule protects the sale from the slightest unfairness, and the discretion of the court is elastic enough to meet all emergencies. It is supported by respectable authority, while that of *Click vs. Burris* is the arbitrary exercise of a boasted power. Judicial power is not the arbitrary will of a good man, but is the science of that discretion, which is governed by the rules of law and equity, and in no case overturns the grounds and principles thereof (*Cowper vs. Cowper*, 2 P. Wms., 753); of which definition it was said "it ought to be imprinted on the mind of every good judge: *Burgess vs. Wheate*, 1 Bl., 123, 158.

The Kent doctrine calls for the exercise of no capricious rules, and makes no illogical distinctions. It protects the litigants and the purchasers from injustice. The Green rule protects the owner more liberally, but does not wantonly victimize the purchaser, who has, in every case with us, *complied on his part with his bargain*, whatever it is, before he can be reported a purchaser, and does not, as in England, withhold compliance until he knows whether or not his bid will be confirmed. The reason of the distinction made in England before and after confirmation is not founded in a desire to secure the highest price alone, but to insure a fair sale and do justice to all concerned. The court exercises its power over the sale indifferently for the benefit of the litigants, the owner and the purchaser, by summarily dealing with the sale, according to the rights of the parties, without the requirement of plenary proceedings, as in controversies between private parties. The reason why before confirmation the biddings are opened more readily than afterwards, grows alone out of their mode of selling, which is so dissimilar to ours that there is only

one familiar feature in it, and that is that requirement of confirmation which is so illogically used to support the arbitrary exercise of the power of the court in a given case. There, the purchaser pays only a small deposit (ten per cent.) as a kind of earnest money to bind the bargain, and makes no attempt at compliance with the terms of the purchase. If he recedes, as he may at will, he only forfeits his deposit (*Anon.*, 6 Ves., 513); he can not be compelled to comply. After confirmation, *he does comply*, and then the contract stands *for that reason* on the footing of private sales. Before confirmation, with the English purchaser, the transaction is in theory and fact "a mere offer to purchase." *Here the purchaser makes a full and complete compliance before his sale is reported, instead of only making a deposit.* He can not recede for a mere decline in prices, or because *he* has made a bad bargain, and if the court chooses to confirm, he is compelled to comply, unless *he* can show such a cause as would avoid a private sale. The right of rescission is not mutual between the purchaser and the court, as it is in England, before confirmation. With an American purchaser, it is a misnomer to call the transaction "a mere offer to purchase." There is, it is true, a reserved right of ratification in the court, but not the power to act capriciously as a private party might do, as if the reservation were unlimited. How incongruous and inequitable to apply the rules of two such diverse systems to each other! This diversity is apparent on reading what is said about Master's sales in 1 Sugden V. and P., and 2 Daniell Chancery Practice, and is pointedly noted in *Collins vs. Whipple*, 13 Wend., 225, and in the note to *Gordon vs. Sims*, 2 McCord's Ch. R., 159.

The American courts recognize this inconsistency of the two modes of selling, and their doctrine is founded in it. The control of the court over the sales is the same, but it is exercised on different principles by applying the best English rules *after* confirmation to our sales, before and after, and for the same reason. It is immaterial to the purchaser here, whether he is ousted of his bargain, before or after confirmation; the effect on him is precisely the same, with only this difference, that if the application is not too long delayed, he may be in possession after confirmation, while before under 4 Heiskell decisions, he is not entitled to it; though, as a matter of fact in Tennessee, he has heretofore nearly always received it from the Master; at least this is so in the Shelby county courts.

If the Legislature shall choose to apply a remedy, as the English

Parliament did, the old Tennessee rule now so hideously marred by *Click vs. Burris*, may be superseded by reserved bids, which practice avoids the objections to both the American and English doctrine heretofore in vogue.

During the time of these decisions in Tennessee, Peck, Catron, Whyte, Green, Reese, Turley, McKinney and Totten were Justices in the Court, and we hear no dissent from any one of them to this Tennessee rule so emphatically and precisely declared, although Mr. Justice Peck was willing in *Henderson vs. Lowry*, to adopt the most ancient and worst English practice even after confirmation.

Before *Morton vs. Sloan*, was the case of *Mann vs. McDonald*, 10 Hum., 275, in which Mr. Justice McKinney, in a gratuitous dictum, said, that *before* confirmation advance of bid alone was sufficient. It was a case *after* confirmation, with circumstances sufficient to avoid a private sale, and the expression was quite as unnecessary to its determination as the law of executory devises. What he said was in direct conflict with *Owen vs. Owen*, and *Donaldson vs. Young*. The same eminent Judge was on the Bench the year afterwards in *Morton vs. Sloan*, and did not dissent from its pointed ruling the other way, in a case where the question was in a proper way again before the Court, in a shape to invite a dissenting opinion in support of his dictum. But when he came to deliver an opinion in *Childress vs. Hurt*, 2 Swan, 487, which was an application before confirmation, with circumstances of fraud sufficient, under any rule, to avoid the sale, he manifested a willingness to inoculate our practice with the denounced and pointedly repudiated English practice, but took the care, being a prudent judge, with respect for authority, to put his *decision* on safe grounds, the existence of the "other circumstances," namely: He coolly ignored the former cases, making no mention of them except to cite *Morton vs. Sloan*, on the point that the Court had the power to set aside the sale, which is undeniable, and followed his own dictum in *Mann vs. McDonald*, which is cited as the authority for the opinion. The *adjudication* is in accordance with the other authorities, but the opinion is certainly in unnecessary conflict with them. If the facts align the case in judgment with the precedents, an opinion can not, with judicial propriety, and certainly not authoritatively, disregard or overrule them. The question was not, What is the English practice? nor, What the power of the Court? but, Shall this English practice be adopted? The Tennessee cases, with authority

requiring at least a respectful consideration, answered: We have prescribed a precise rule; follow it. The English Judges answered: Do not adopt it, we only tolerate it because we doubt the power to disturb it. The American Courts said: We have repudiated it as inapplicable to our mode of selling, and undesirable. It was not an open question, had been adjudicated, and the rule of *stare decisis* forbade a change.

The opinion, then, was as reckless in its insubordination as *Click vs. Burris*, and as a careful and valuable examination of principles and authorities, has no advantage of it. It is the source of all the imaginary confusion of authorities in Tennessee, and is the prototype of *Click vs. Burris* and its attending cases, *Parsons vs. McNickle*, Jackson, 1873, and *Wilson vs. Shields*, Nashville, 1873.

These last two cases only follow the leading case, but do not add any to its value.

Mr. Justice Totten reviewed the authorities in *Houston vs. Aycock*, 5 Sneed, 406. He recognized that the Tennessee cases, "on grounds of well considered policy require something more" than mere advance of price. What he says may be obiter, but it is a fair set-off to that of *Mann vs. McDonald* and *Childress vs. Hurt*. It has the advantage of showing on its face an examination of the subject. (As to the comparative value of dicta, see Ram. Legal Judgment, 88, *et seq.*) Judge McKinney was on the Bench when the opinion in this case was propounded and again made no dissent.

Mr. Justice Milligan, in *Coffin vs. Corruth*, 1 Coldwell, 194, when McKinney, Caruthers, and Wright were in the Court, as special Judge, in almost the very words of Lord Eldon in *White vs. Wilson*, depreciated further laxity in opening the biddings, and this was binding on the Court in *Click vs. Burris*, as a truthful expression of the *policy* of the cases theretofore decided by the Court. He was betrayed into the dictum, (it was a case after confirmation) that before confirmation advance of bid was sufficient, and the biddings would be opened on slight grounds, but afterwards, when he was on the Bench in *Johnson vs. Quarles*, 4 Cold., 615, this expression was condemned as obiter. This latter case for the first time presented the question shorn of all other considerations. The proof did not show any "other circumstances," and the advance was twenty per cent. It was the naked question. Mr. Justice Shackelford, in a carefully prepared opinion, declared the law to be, *that an advance alone is not sufficient*. This closed the question in Tennessee, if it ever has been one since *Owen vs. Owen*. It has

been the object of this article to show that that case is the settled law of Tennessee. There is a solid phalanx of adjudicated precedents in this State for it—not one against it. If other eminent expounders of the law are to be believed, it contains the sounder doctrine. Why was it overruled?

*Click vs. Burris* does not afford a satisfactory answer. So far as *Childress vs. Hurt* supports the overruling case, it had been itself overruled by *Johnson vs. Quarles*. There is not another case which furnishes a plausible excuse for the disrespect shown for this, and its preceding cases, by the Court, or Mr. Justice Nelson. It is said in *Click vs. Burris* that *Newland vs. Gaines*, 1 Heisk., 720, doubts *Johnson vs. Quarles*, but the force of the statement is not perceived on examination of that case. What was said by Mr. Justice McFarland was confessedly outside the case, and it is a perversion of it to call it a disapproval. Besides, his disapproval could not alter the binding effect of it as an adjudication. It speaks in the language of command, unless the principle be asserted that each succeeding Court may, at will, disregard the adjudications of its predecessors.

*Moore vs. Watson*, 4 Cold., 64, is in accord with the precedents and requires no notice here. *McMinn vs. Phips*, 3 Sneed, 196, is sometimes erroneously cited as a case on this subject. There was no advance bid in it.

The desire to be brief is overcome by the temptation to quote before concluding, what was said in the House of Lords in *Barlow vs. Osborne* upon this subject of opening biddings. It was in 1858, before the statute of Victoria, hereinbefore referred to, had abolished the English practice so heedlessly and perhaps illegally adopted by the Supreme Court of Tennessee. The case arose under the reformed practice, as instituted by the General Orders of 1851, and as an adjudication is immaterial to the present purpose, but the opinions expressed show what the English Lords understood the English practice to have been, how cordially they were hostile to it, how essentially different it was from the anomalous rule of Mr. Justice Nelson, and last, though not least, how the Lords, under the most trying temptation, could forego the desire to legislate while acting in their judicial capacity. The Attorney-General, *arguendo*, said of the disused English practice, "There is no principle to justify it." And again, "The greatest equity judges have declared it to be mischievous:" 6 Ho. Lords Cases, 559.

Lord Chancellor Cransworth said what follows: "Your Lordships are well aware what that practice is, namely, that in the case

of estates which are put up for sale in the ordinary mode, by auction, by direction of the Court of Chancery, until there has been a final order . . . establishing a particular person to be the purchaser, a third person may, *generally speaking* (the italics are those of the present copyist), intervene; and upon no other ground than that he offers an advance of price, *provided it be a considerable advance*, the sale may be set aside, and he, paying all the expenses which the previous purchaser has incurred, gets an order that the estate shall be put up for sale upon his advanced price :” (p. 565).

Now, undeniably, the Supreme Court of Tennessee, having wilfully determined, as a matter of course, to set aside *Johnson vs. Quarles*, and the preceding cases in Tennessee, and having before it a case where there was no other circumstance but an advance of bid, or only insufficient circumstances so declared to be, could have found excuse, in the rigid exercise of the obligation due authority, and because they have heretofore held that in the absence of other prescribed rules those of the High Court of Chancery in England shall prevail, for adopting the English practice above detailed. And, if *Click vs. Burris* shall be held to be an adjudication of the insufficiency of the “other circumstances” therein found to exist, it is an authoritative adoption of that practice, the other cases being overruled for the purpose, unless it shall be further held, that Mr. Justice Nelson had the power to prescribe, speaking for the Court, the “fixed rule” of that case.

Further speaking the learned Lord proceeded to say: “Now, no one can look at that practice without deploring it, and without seeing that it is a practice which upon theory must lead, and which according to experience constantly has led, to the greatest inconvenience, I do not say injustice, because supposing persons, who are tendering money as purchasers to know what the rules of Court are, which we must, I suppose, presume they do, then it is not unjust to them that they are dealt with in respect of their purchases in accordance with these rules :” (p. 565).

The extract is broken here to submit the remark, that it is at least due to the purchasers, that those rules, with notice of which they are thus to be charged should be founded in authority, and not frequently changed, which is no doubt the purpose the Court entertained in announcing the rule of *Click vs. Burris* to be a “fixed rule.”

“But,” says the Lord Chancellor, of the English practice, “it is most inexpedient, because with reference to the interests, not of the purchaser, but of the seller, it is obvious that the knowledge, when

I am bidding for an estate, that I may, within a week or fortnight, or perhaps a month or two months afterwards be deprived of that for which I had a sort of enthusiasm at the moment when I became the purchaser, must necessarily damp my ardor, and I therefore do not give that which I otherwise might have given. Sometimes it may happen that what is thus lost is more than compensated for by the additional publicity which is given to the proceeding, by which additional purchasers may be invited into the field. But all these discussions . . . are discussions which may be rather addressed to your Lordships in your legislative capacity, or perhaps in some respects to the individual, who has now the honor of addressing you as head of the Court of Chancery, with a view to see whether or not some amendment may be made in this practice. The question we have to deal with here is, what are the rights of the parties with reference to the existing practice:" (p. 567).

Lord Wesleydale said: "I concur also in the observations which have been made as to the propriety of putting a stop to the practice which has prevailed in the Court of Chancery, of opening biddings. I am quite alive to the observations which have been made against that practice, and I hope that occasion will be taken, either by Act of Parliament, if necessary, or at least by order of the Court, entirely to put a stop to it."

What would these learned Lords have said of one, who, thirteen years later, after their recommendations had become laws in their own country, should deliberately, and of his own choice, set aside amendments made in the same spirit, to go back to this mischievous practice?

The opinion in *Click vs. Burris* excludes from the operation of its "fixed rule" those "sales which have already been made," and, it is supposed, it takes effect "from and after" the particular day of the Knoxville Term, 1871, on which the "DECREE" was made, not counting fractions of a day, and not forty days thereafter, as provided in Article II., § 20, of the Constitution. The case not being yet reported, the precise time may be fixed by application to the Clerk for his deposition. In adjudicating upon the excepted sales, it is presumed the old law will be enforced, and perhaps the subject may be reconsidered by the Court in those cases. The new rule is so dictatorial and "fixed" that it affords no opportunity for reconsideration in cases arising after it. *They are settled beforehand.* It was intended they should be. E. S. HAMMOND.

Memphis, Tennessee.

## *The Right to Disinherit Without Cause.*

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I propose to inquire whether the power, as given by English law, and by that of those of the United States adopting the English system, to control by will the disposition of property, so as to enable the ancestor to arbitrarily disinherit his children, is in accordance with, or is sustained by, the law of nature.

By law of nature I understand the dictates of justice, and they create rights and impose obligations, so obvious and so generally acknowledged, as to be called natural. They are so called because they are approved by the instinct of justice, or the moral sense which is part of our being or natural to us; and in this connection it does not matter whether we adopt the theory of natural moral instincts, or otherwise account for these sentiments. I use the term, not to raise this question, but as one of universal use, both among the Romans and with us, as applied to regulations obviously in themselves just, and generally so received. Nor does it matter whether the term is applied to the regulations themselves, or to that ideal something which inspires them.

And first, it is necessary to consider whether the law of nature has anything to do with the disposition of one's property at his death. Most of the writers of the eighteenth century deny that the law of descents is within its scope, and Blackstone says that "rights of inheritance, or succession, are, all of them, creatures of the civil or municipal law," as distinguished from natural law. If he and they mean, that the actual regulations of leading States, as primogeniture among the English, and the exclusion of emancipated sons and married daughters among the Romans, are not dictated by the law of nature, no one will make issue with them. The law of nature can not give one child a preference over another, unless from infancy or some infirmity he is less able to take care of himself.

But that the children of the deceased have higher claims to his property than those of strangers seems clear, and I infer it.

1. From the universal sense of mankind. What is universal may be safely called natural, and I know of no community in which the superior rights of descendants are not acknowledged, although their enjoyment is modified or controlled by political institutions, prevailing habits or modes of thought.

The equal right to the inheritance of all the children, including those adopted, belonging to the *familia*, was from the beginning recognized by the Romans. The Athenians and Jews gave a preference to male children, that preference, among the former, arising from the low condition in which women were held, and among the latter from the policy of preserving the inheritance in the family. Among the barbarians of the north the children succeeded to the parents' possessions, and no cotemporaneous people are known that knew any other rule. The civilization of China and Hindostan was far more ancient than that of Europe, or even Western Asia, and, so far as we know, there was no connection the one with the other, and we find in those extensive countries the same general rules prevailing from the beginning, only with a greater restriction upon the power of the ancestor. A rule could hardly have become so universal among both civilized and barbarous peoples, unless dictated by the instinct of justice. "When the practice is universal, it is reasonable to think the cause natural."<sup>1</sup>

2. Parents are under special obligations to those they have brought into this world. This superior obligation gives a superior claim.

3. Children are servants. They have always been held to the duty of serving one or both their parents, and this duty has not always ended at a particular age. They thus contribute to the paternal estate and acquire a direct interest in it.

It may be said that this obligation to service arises from indebtedness for nurture. But this can not be, for nurture is an imperative duty, our obligation arising from parentage, aided in its performance by the parental instinct. No more can it be replied that this service is itself a benefit to the child. This is ordinarily so in fact, yet that benefit can not be called his wages. When there is no parental obligation an apprentice is paid for his service by the instruction he receives and the power acquired through such service; but not altogether so with our offspring, for to train to good habits, to develop all their powers, that they may enter full-armed into the contest of life, is but an imperative duty in and of itself, and not a consideration for their labor.

4. Wants are chiefly artificial, and are created by our habits, and our manner of life. These habits, and this manner of living, commence in childhood; they are usually shaped by the possessions of the parents, and so far, they create these wants. A child of wealthy

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<sup>1</sup> Locke on Gov., ch. 9, § 88.

parents has ordinarily many unknown to others, which, to him, have become actual necessities, and which have been so created. Not only that, but the obligation to teach him how to provide for himself is ordinarily ignored. If taught to labor at all, it is not so much to create wealth as to preserve it. Every instinct of justice revolts at the wrong of turning such children naked upon the world, and demands that the property which created their wants and their weakness, should, no other rights intervening, supply the former and supplement the latter.

5. The family is the only strictly natural society; it is the original commonwealth. We read in the Jewish Scriptures of Patriarchal communities under the government or headship of Abraham, of Lot, of Job, etc., and read of no government or common head over them. Modern history gives us the clans of Scotland and Ireland, families of remote kinship or of adoption, and which were almost independent of the common head. The Roman *familia* antedated the Roman State, and the *patria potestas* colored its whole jurisprudence. In all countries, communities are but aggregations of families, and though the State has now personal relations with and obligations to the individual, though it has many functions formerly pertaining to heads of families, yet so long as we have that divine inspiration that attaches and binds the sexes; so long as there is dependance in, and obligation to the fruits of their connection; so long as *my* or *mine* is applied to persons; so long as there is natural affection and the love acquired by nurture and long association, its unity and separate interest will remain. Is it not reasonable then, when death snatches one from his possessions, that they should remain rather in the family than fall into the hands of strangers? It is for this reason, rather than the one given by Locke,<sup>1</sup> that parents may claim the property of their deceased and childless children.

From these considerations, I am led to deny the correctness of Mr. Blackstone's statement; and I am happy to know that in this I but follow that great lawyer, our own Chancellor Kent. In speaking of inheritance, he says: "The transmission of property by hereditary descent from the parent to his children, is the dictate of the natural affections. . . . It encourages paternal improvements, cherishes filial loyalty, cements domestic society, and nature and policy have equally concurred to introduce and maintain this

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<sup>1</sup> On Government.

primary rule of inheritance in the laws and usages of all civilized nations.”<sup>1</sup>

The attention I have given this point will not be thought uncalled for when we consider the mischiefs that so often spring from a false doctrine, though but a speculative one. Hardly a discord jars society, or an evil afflicts us in our public relations, unless the fruit of moral disease, that may not be traced to some false speculation, and hence the importance of basing our systems upon the principles of natural justice.

Having arrived at the conclusion that the primary rule of inheritance is dictated by the law of nature, I will next inquire whether this law gives one the unrestrained right to dispose of his property by will.

The idea of property implies the right of disposition. But the disposition of property ordinarily involves the transfer of possession, always the yielding of some interest with no power to resume it, which is repugnant to the instinct of dominion, and is not supposed to occur without sufficient inducement or consideration. The disposition by will involves no such transfer; it takes effect only after the owner has lost possession, only when the property is beyond his control.

To repeat: One has the exclusive right as against all the world to the fruits of his own labor; he may possess and enjoy them, and also dispose of them according to his pleasure. He has also a right to reduce to possession portions of the common stock, and, by mixing his labor with these possessions, as by improving wild land, taming wild beasts, or converting trees or rock into a dwelling, he acquires in them a superior right both of enjoyment and disposition. These axioms of natural law are respected alike in civilized and savage communities. But granting their soundness, they go only to the disposition of one's property so long as he has power over it, and, doubtless, while so under his control he may exchange it for other property, and, in general, may otherwise dispose of it as may seem to him proper. After, however, it drops from his hands, when he can no longer grasp it, upon what principle of natural law may he say who shall take it up?

The sanction of universal law can not be invoked to sustain the unrestrained power of disposition by will. Among the most ancient nations it was unknown. No provision seems to have been made for it in the Gentoo Code; the right of inheritance was too

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<sup>1</sup> Com., L., 67.

much respected to be subjected to the will of a dying ancestor; and even the alienation of property during life was restrained in favor of living children. We find no wills and testaments among the old Teutons, and among the Athenians they were first authorized by the laws of Solon; and even then they yielded to the rights of male descendants. The care of Moses to secure the family succession is familiar to all. Testamentary dispositions were originally unknown to the Jews, and when, after contact with the Romans, they came to be authorized, they took effect only when kindred failed.

The modern power of testamentary disposition is considered as having sprung from the Roman law, but to the extent authorized by English and American law, it can derive from it no sanction—at least, from its original scope and object. The family, ordinarily composed of descendants of its head, those incorporated into it, being the unit in the State, was, with the slaves and dependants, absolutely subject to this head. The *patria potestas*, for the government and protection of its members, clothed its possessor, as father, magistrate and despot, with an authority repugnant to modern ideas. The State hardly knew the individual, and originally the will was little more than a designation of him who should succeed to the paternal power, the lordship, as it were, of the manor, and it was published and approved in the *Comitia Curiata*, an assembly representing the patrician families as such. The testamentary power was enlarged by the Twelve Tables, and extended to plebeians, the will took the form of a sale and conveyance; it was public, and, at first, irrevocable, and the beneficiary was called the purchaser of the family. Legacies, however, came to be recognized, its form was gradually modified, and its limitation was fixed by one of Justinian's novels. My object, however, is not to show the form of the Roman will, but rather its object, and, instead of continuing but a semi-political act, it came to be used chiefly as a means of doing justice to all. The great difference between its object among the later Romans and that of the devise and bequest under the laws of our State will appear when we consider "that a will seems never to have been regarded by the Romans as a means of disinheriting a family or of affecting the unequal distribution of a patrimony," but was "chiefly valued for the assistance it gave in making provision for a family and in dividing the inheritance more evenly and fairly than the law of intestate inheritance would have divided it."<sup>1</sup>

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<sup>1</sup> Mayen.

The rank taken by Roman jurisprudence, and the fact that it has been the chief inspiration of modern ideas upon the subject, will excuse me for a little more particularity in this connection.

The Roman family (*familia*) consisted of those who remained under the power of its head. The father not only controlled his infant children, but, unless emancipated, his power over them continued during his life. The sons and their families, including wives, children, and grandchildren, the unmarried daughters, the adopted children, who were as though born in the family, and the wife herself, if married according to the ancient mode, were subject to his absolute power. All their earnings went into the common stock—common, not as belonging to them all, but as the property of the head—and their liberty, and even life, were subject to his will. All persons thus in *familia* subject to *patria potestas* were called *agnati*, (agnates) and in case of intestacy, succeeded *per stirpes*. But the daughter who, by marriage, had entered another family, the son who had been emancipated, and his children, were not members of the family, were not agnates, but *cognati*, and cognates inherited nothing. And if the agnates all failed, the cognates, as such, could not succeed, but the property went to the Gens, or tribe to which the ancestors belonged. Thus a son, who, in consequence of unusual good conduct or ability, or from greater affection or confidence on the part of the father, had been emancipated, and thus enabled to become himself the head of a family, was cut off from any share in the estate, and all married daughters, however bound by affection to the paternal home, were compelled to see property, theirs by natural right, go into the other hands, and perhaps those of strangers.

The original mode of remedying this obvious wrong was not by modifying the legal constitution of the family, abolishing the *patria potestas*, except so far as necessary for nurture and education, and with it the distinction between agnates and cognates—it was too firmly fixed in the minds and habits of the people to be directly attacked—but the ancestor was enabled to avoid, by will or testament, the operation of the law of descents. It was supposed that the father would not fail to recognize the claims of those who had gone out from the family, if worthy of remembrance. This power to avoid the injustice alluded to was greatly prized by the Romans, and testamentary dispositions were recognized as due to the honor of the house.

The general power, however, of making such dispositions, involved the power to disinherit a child, and so contrary to natural

law, that is, so unjust, did it appear, that its attempt came to be construed with a strictness not applied to other provisions. Hence, it was held not to be sufficient to adopt as heirs, those to whom the ancestor designed to give the estate, leaving natural heirs unprovided for, but, in order to disinherit the latter, they must be named, and the intention to do so must be affirmatively expressed. This strictness in the construction of wills, which is as far, and a little farther even, than we have ventured in restraint of paternal caprice, did not reach the evil, it was, therefore, afterwards, and before the fall of the Republic, provided that a son, who felt aggrieved by the disposition of the estate, might attack the will as inconsistent with duty and natural affection, and the magistrate so finding it, would set it aside, as having been the dictate of an unsound mind. Perfect sanity was thus made to consist, not only of integrity in intellect, but in heart and moral sense, as well. In process of time the ancestor was compelled to leave to the natural heirs, at least, one-fourth of the estate, with the liberty, however, of disinheriting wholly for undutiful conduct. That this matter might not be left too much to the discretion of the magistrate, it was provided by one of the *Novels of Justinian*, that the testator must name in the will his reason for disinheriting the child, which reason must be one of fourteen mentioned in the edict, and which pertain chiefly to filial duty.

Thus, we see that, in the process of Roman jurisprudence, as the more than feudal *pater familias* yielded to the dictates of natural law, the rights of children were recognized, both in the original power of testamentary disposition, and in the subsequent curtailment of that power.

Upon the Continent the later provisions of the Roman law have been followed in spirit, although the power of the testator is still more restricted. The Code Napoleon compels him to respect the rights of his children, not only by *remembering* them in the will, that is, naming them, if but to disinherit, but by leaving them from one-half to three-fourths of the estate according to their number. The Spanish and Spanish American laws are equally restrictive, and the Code of our sister State of Louisiana, follows in their footsteps. I can not speak in this regard of the laws of all the European States, nor is it necessary to do so, but it is believed that in none are the natural rights of children so disregarded as in the United States.

Nor do our laws find countenance in those of England whence

they are derived. We know but little of the testator's power among the Anglo-Saxons, but inasmuch as it was unknown when they invaded the island, and came to be recognized after their conversion, and the kingdom had become consolidated, it probably sprung from the Roman law. At least, we know that this law prevailed among the Romanized Britons, that it was favored by the clergy, and that its provisions, unless opposed to imperative customs, would be likely to prevail as ecclesiastical power became established, and the people emerged from barbarism.

Of the early law as it was settled after the Norman conquest we know more. While lands could not be devised until the Statute of Henry VIII. chattels had always been subject to bequest, although under important restrictions. If the testator had neither wife nor child, his power was unlimited, but if either were living, he was limited to one-half, and if both, to one-third; the absolute power of the ancestor, without regard to the claims of children, was unknown to the common law, and it is believed, that, had the English law of inheritance been reasonably just, we should never have heard of the present power of disinheriting every member of the family except the wife. This law, as pertaining to real estate, was, and is, so essentially unjust, that we must regard with favor any power to modify its operation. The old Roman valued the privilege of remembering, by testament, a beloved daughter or an emancipated son, or their children, who had technically become strangers to the family; and the English father, however, from political considerations, he may defend the law of primogeniture, would feel greatly aggrieved, if he could make no provision for the younger, and, perhaps, more dependent members of his family. His power, as testator, comes to the aid of justice, and enables him to smooth the inequalities of the law; it is a tribute, though an imperfect one, to the equal claims of the family, and a protest against the system that ignores them.

I have thus alluded, in a general way, to the power of a testator in some of the States, ancient and modern, of which we know most, and especially to the two great systems, that of Rome and of England, which so color the jurisprudence of the world. It is seen that the testamentary power recognized in our States—and in speaking of the States in this connection I must be always understood as excepting Louisiana—finds no sanction in the general consent of mankind, and not even in those systems from which it is derived.

Again, we have seen that children have a natural right to the

inheritance, and if this be so, the ancestor can have no right to deprive them of it. Rights do not thus conflict, and the reasons before given for believing that our general law of inheritance is according to the law of nature, imply restraints upon the absolute power of disposition by will. If our reasoning was sound the law is unjust. And further, if one has a right to control his property after his death, why may he not bind it forever and create a perpetuity? The right of perpetual entailment is the inevitable corollary of the absolute right of devise or bequest.

But it may be said that the law, as we have it, works well, even if not defensible upon principle or common consent. If this were so, it would strongly tend to show that the reasoning that condemned it was unsound. But it is not so. So strong, it is true, are the parental instincts and the sentiment of justice, that instances are not common where they are violated in the final disposition of estates. But restraints are not for the intelligent and well-disposed, and we sometimes see children reared in expectancy and dependence, turned off naked by a will inspired by suspicion, anger, superstition or second childhood.

A millionaire has reared a family—the habits of his children, their expectations, their social and conjugal connections are formed in view of their heirship. This is reasonable—it is unavoidable. The sons and daughters expect, they have a right to expect, to succeed to the estate. It matters not whether they are better or worse for this expectation, whether a knowledge that they had nothing would or would not be a blessing. In many, perhaps in most instances, it would be better for the child if there were no inheritance; better if the habits following their expectations of wealth had never been formed; better if their connections had been alone with the self-dependent. But even if it be so, the parent rather than the child is responsible. It has been his fault if expensive habits shall require a portion to sustain them, and it will be his fault, almost his crime, if the fortune shall be causelessly withheld. So certain, so natural, are the child's expectations, that to disappoint them would inflict a suffering few are able to bear.

This millionaire, while in the vigor of manhood, regards his children as his heirs. But age creeps on and he again becomes a child. A sharp woman, with needy relatives, may get possession of him, and gradually, very slowly perhaps, a breach is created between him and his children. They see her designs, which he does not, and by meeting them perhaps roughly, play into her hands. I need not trace the steps, but when the old man dies, a will is pro-

duced, and this woman and her friends receive the estate. The children, it is true, must be "provided for," as our statutes ironically use the term, that is, remembered, although to be cut off with a shilling, or, perhaps, some cunning priest has been eyeing his possessions, and the imbecile, in terror for his short-comings, is induced to purchase Heaven with his wealth.

It may be said that if the law of nature denies the right to disinherit, it would also deny that of sale or gift. A general, or an extensive donation *causa mortis* might fall within the principle, but to prohibit ordinary transfers would imply that, as among the Hindoos, children have a present interest, and that the ancestor has no absolute property.

Natural law recognizes duties as a member of society, and especially towards the family, but it would not prevent alienations. Man is the only swapping animal, as Adam Smith has it, and to deny exchange, would outrage the universal instinct. Interests, in bare expectancy, can not be protected at the expense of present ownership; the property holder during life, *i. e.*, so long as he can possess and control his property, should really own and control it. He may not respond to his obligations—few do wholly—but the law can not enforce them by denying the incidents of property.

May not then the ancestor, by such alienations, as effectually disinherit as by will? Possibly he may. Yet how rarely do we lose our love of dominion—part with the property instinct. One is very far gone indeed, so much so as to render his alienations of doubtful validity, who would reduce himself to poverty in order to impoverish his children. This has been done, yet so contrary is it to our instinct of justice, as to be treated almost of itself as evidence of an unsound mind, at least of undue influence. Such is our superstitious reverence for a will, that dispositions made by its means are comparatively sacred. We are more prone to condemn a voluntary transfer of an estate to a stranger, while it is actually the father's, and when he himself delivers possession, may be said to have a right to its disposition, than if the transfer were made to operate when it is no longer his. We condemn both, and the fact that we do so is an acknowledgment, unconscious, perhaps, of the rights of the child. The former we may, perhaps, not prevent, without infringing upon property rights; the latter we may, and disturb no such rights; and to do so, we need only copy the laws of leading European States.

P. BLISS.

Columbia, Mo.

## THE SEPARATE ESTATE.

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A long series of discordant and confused decisions by the Supreme Court of Tennessee recently culminated in a direct conflict of opinion between the present Court and its immediate predecessor as to the power of a married woman over her separate estate.

The numerous conveyances of late years settling property to the separate use of the wife, free from the debts, contracts and control of the husband, and the many transactions thereunder, have opened a fruitful field for litigation unless something is done to attain uniformity of decision.

A reference to the decisions of other States will also show that, with very few exceptions, the question is a vexed one. Eminent judges, after most elaborate reviews, have arrived at directly opposite conclusions. There seems to be no way out of this labyrinth of difficulties except by adopting and pursuing to its logical conclusion, one of the two principles much discussed in connection with this subject. The endeavor will be made to show that unless this is done there is no prospect of obtaining any satisfactory solution of the questions constantly arising, not only as to the power of the wife to convey or charge her separate estate by proper instrument, but especially as to its liability for her general contracts. For convenience, the two principles will be alluded to as the first and second.

So early in the history of the separate estate as the case of *Hulme vs. Tenant*, 1 Brown, C. C., 16, the first principle was adopted to its full extent, and, if this case had been unhesitatingly followed, there is good reason to believe that the subject would have been stripped of its perplexities, and rendered comparatively simple. In this case Lord Thurlow enunciated the principle that in equity, as to her separate estate, a *feme covert* is competent to act in all respects as a *feme sole*, unless specially restrained by the instrument of settlement, and accordingly he held that her general personal engagements should be executed out of her separate estate. The rule which had been laid down in *Peacock vs. Monk*, 2 Vesey, 190, by Lord Hardwicke, that a *feme covert*, acting with respect to her separate estate, is competent to act in all respects as a *feme sole*, was extended to its extreme limit by holding her separate property liable for her engagements in no manner relating to or respecting it.

The Legislature of Tennessee has by a recent Act (Act of 1869—70, chap. 99), virtually adopted this principle, though the peculiar nature of the Act may lead to some doubt as to the application of the principle to all classes of cases; but, however this may be, an opportunity is afforded the Chancery Courts of this State, by the legislative change of the principle of decision heretofore adopted by them, to rid the subject of most of its former difficulties. The Act will be noticed more particularly in conclusion.

But this doctrine of Lord Thurlow was not received in England without a struggle which is almost without parallel in the judicial history of that country. For more than half a century *Hulme vs. Tenant* was debated and doubted, combatted and reluctantly followed by successive Lord Chancellors, though it is believed it was never directly overruled, and it was not until the case of *Murray vs. Barlee*, 3 Mylne and Keene, 209, that its authority was fully recognized. Without doing more than referring to the reluctance of Lord Thurlow himself to enforce the result of this doctrine in subsequent cases (*Ellis vs. Atkinson*, 3 Bro., C. C., 347, etc.), the restraining views of Lord Rosslyn and Lord Alvanley, M. R., (*Whistler vs. Newman*, 4 Vesey, 129; *Mores vs. Hinsh*, 5 Vesey, 692; *Hyde vs. Price*, 3 Vesey, 437; *Socket vs. Wray*, 4 Bro., C. C., 484), the distinctions of Lord Loughborough between the express and implied contracts of the wife (*Bolton vs. Williams*, 2 Vesey Jr., 238), and the doubts and distractions of Lord Eldon, (*Jones vs. Harris*, 9 Vesey, 497; *Parker vs. White*, 11 Vesey, 209, etc.), it is sufficient to say that the rule in *Hulme vs. Tenant* was fully recognized by Lord Brougham in *Murray vs. Barlee*, *supra*, and confirmed by Lord Cottenham in *Owen vs. Dickenson*, Cr. and Ph., 53, though the doctrine of *Mrs. Mattheurman's case*, L. R., 3 Eq., 781, and other later cases, seems to require that the contract should be upon the credit of the separate estate, so intended by the *feme*, and so understood by the person with whom she is dealing: See *Shattock vs. Shattock*, L. R., 2 Eq., 182; 35 L. J. Ch., 509;; *Johnson vs. Gallagher*, 3 D. F. and J., 404; 7 Jurist, N. S., 373;; *Picard vs. Hine*, L. R., 5 Ch. App., 274, cited in Benjamin on Sales, 2d ed., 31. While this requirement is not entirely consistent with the reasoning in *Murray vs. Barlee*, and *Owen vs. Dickenson*, nor indeed, with the logical result of the broad principle laid down, and so calculated to open the door for litigation, yet it is perhaps a just limitation of the liability of the wife. With this qualification then, the English doctrine may be thus stated: The

wife, as to her separate estate, is competent to act in all respects as a single woman, unless specially restrained, but for the protection of the wife the court will require that the contract be made upon the credit of the estate, so intended by her and so understood by the party with whom she deals.

It is very certain that without the qualification or limitation arbitrarily imposed by the Court, and even with it no question of more than ordinary difficulty is likely to arise, she is competent to act. Has she acted upon the credit of the estate? If yes, then her estate is bound, whether the contract is for building her a house or a pleasure boat, or for necessities or luxuries. Whatever may be the demerits of this principle, it certainly has the merit of being simple. Whether or not the limitation should be added is a question of policy—the principle should not be affected by it. A reference to the English cases cited will show that the debate has been more about the authority and propriety of the principle than its logical consequence. If there are any special restrictions in the settlement, still the principle is not affected. The ordinary rules of construction are applied to the restrictions, and if the act sought to be authorized, or the liability sought to be enforced, falls within the restrictions, neither can be maintained.

But there is a second principle diametrically opposed to the above which, if adopted and pursued to its logical conclusion, will also relieve the subject of its perplexities, viz: That a married woman, even in equity, is to be viewed as a *feme covert* with all the disabilities attaching to her condition at law, possessing no powers and subject to no liabilities except those derived from, or created in, pursuance of the instrument of settlement; that in acting she exercises a delegated power solely, and must pursue it, and all charges against her estate must be under and by virtue of the power solely.

It is not necessary to discuss the merits of either of these principles as opposed to the other. I have not the ability to do it satisfactorily, and will only attempt to show that the adoption and full development of one or the other is necessary to the attainment of uniformity of decision, on any settlement of the questions arising on the subject, and that the failure to adopt either, or carry it out when adopted, has brought about all the perplexities. This can best be done by looking at the result in England, as stated above, and by a reference to a few of the many hundreds of American cases.

The first which will be noticed is the oft quoted one of *Methodist Episcopal Church vs. Jacques*, 3 Johnson Ch. R., 77, 120, in which the principal English cases to that time were elaborately reviewed and criticised by Chancellor Kent. Notwithstanding his decision was reversed in the Court of Appeals by the unanimous opinion of the judges, the learned Chancellor's opinion has had a controlling influence in many of the States, and, with great deference, I really believe has added much to the confusion on the subject. There was no restraining clause in the settlement in that case, but simply a prescribed mode of disposition. According to the first of the principles above stated the power of the wife should not have been affected by this clause; according to the second she was of course confined to it.

He prefaces his review with the statement that he is very unwilling to admit, that, notwithstanding the cautious language of the settlement, the wife was to be deemed to have absolute dominion over the property as a *feme sole*, and not bound by the prescribed form of disposition. "Justice and good faith," continues he, "require that the wife should not lose, nor the husband acquire, that separate use of the property unless in the mode prescribed. These interests which married women are permitted to take for their separate use, are creatures of equity, and equity may modify the power of alienation according to the intention of the settlement, which is to secure a separate and certain provision for the wife free from the control of the husband, and not to be parted with except in the mode and under the checks prescribed. If the technical rule of law, that when a person is owner of property he takes it with all its incidents, and that every restraint on alienation is repugnant to the ownership, be applied to these settlements, they may be abandoned at once as delusive, for the most guarded proviso against alienation would be void. But I am not able to perceive any objection to a fair construction of these instruments, nor to a decided support of them according to their object and intention, without suffering ourselves to be embarrassed by such technical rules. I wish that I felt myself more at liberty than I do to pursue this course, for the weight of authority seems to impede it; yet I apprehend the cases are too unsettled and contradictory to afford any certain conclusion on the point. They are certainly in favor of the position that a married woman is considered in equity as a *feme sole*, and is held to have an absolute dominion or power of disposition over it, unless her power of disposition be restrained by

the deed or will under which she became entitled to it. The next question then is, when does the deed restrain her? I think she is to be deemed restrained in the present case to the modes of disposition mentioned, and that her husband can not set up any other less solemn alienation against her. Here also the weight of book authority, and especially of the writers who have treated on this branch of the law, is against this conclusion; they seem to hold that there must be an express restriction upon alienation, either absolutely or by some other mode than the one mentioned, or the wife will not be bound. But if the intention be equally clear and certain in the instrument in question, why should more explicit language be required? The intention evidently was in this, as it is in most other cases of property settled to a married woman's separate use, that the interest should be unalienable, except in the mode provided. Then why should not the court give effect to that intention? There is no sufficiently uniform and unruffled current of authority to prevent it."

This reasoning is strong, and it has had its influence. But it should lose much of its force when it is borne in mind that provisions against alienation, except in the mode prescribed, are not void when introduced into a settlement to the separate use. They are repugnant, it is true, to the technical rules of law, but as by a violation of these rules the separate estate itself was created or acknowledged, so by a further violation these restraining clauses, or clauses against anticipation as they are usually called, have been sustained. And these settlements as drawn in England, even since the absolute power of the wife has been sustained beyond dispute for the last fifty years, are anything but delusive. Allowing the *a priori* power, as it may be styled, of the wife, a settlement properly executed with the view of depriving her of this power will as completely disable her as if the contrary or second principle had been adopted.

Waiving any discussion of the justice and good faith of allowing the wife to dispose of the estate in any other than the prescribed mode, the legal construction, based upon the inherent power of the wife, most certainly allowed her to dispose of it as she pleased, there being no restraining clause in the settlement. Hence it was that Chancellor Kent was led to deny the first of the above principles, that the wife should be considered in all respects as a *feme sole* with power to do as she pleased, and to seek authority for the position that she should be considered a *feme sole sub modo*, a sort

of mean between a *feme sole* absolute and a *feme covert*. It is true, he says in conclusion, that instead of maintaining that she has an absolute power of disposition unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power except what is specially given her, and to be exercised only in the mode prescribed, if any such there be; that her incapacity is general, and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of the law.

Now, if he had been bold enough to have disregarded the English cases altogether, and decided the case upon this view, which is none other than the second principle stated above, no objection could have been made except that it was directly contrary to the English rule. Clearly, he does not decide the case upon this principle, but upon the supposed intention of the settler. He admits, hesitatingly, it is true, that if the instrument is silent as to the mode of disposition, it should be left at large from the presumed intention of the settler not to restrain it. This is incompatible with the position that she has no power except what is specially given, and to be exercised only in the mode prescribed, and that her incapacity is general, etc., and confusion must follow unless one position or the other is absolutely rejected. This rule of the intention governing each case, regardless of principle, the Chancellor himself confesses at page 108, is open to great objections. He says, that the cases make distinctions on this point too refined to be useful and so subtle as to be dangerous, quoting Mr. Sugden as complaining of this subtlety, and saying that it is almost impossible for a practitioner to advise confidently on any case where the very words have not received a judicial construction.

The objection to Chancellor Kent's view is that nothing is decided upon principle. The woman is neither a *feme covert* nor a *feme sole*. No rule beyond the supposed intention of the settler is laid down, and this intention is to be collected from all the facts and circumstances of each case. Every settlement, unless the very words of it have been passed upon, is likely to become the subject of a lawsuit.

If the first principle is adopted, the legal construction, I say, of a merely prescribing clause would not deprive the wife of power. The prescribing clause suffices, when it is complied with, to make valid the conveyances and charges of the wife, in a court of law, and to confer legal rights upon parties dealing with her; but it does

not operate to deprive a court of equity of the power to enforce any of her contracts respecting her separate estate fairly entered into. If the wife complies with a prescribing clause, neither the first principle nor the intention has any application; she simply exercises a power, and this a *feme covert* may do, whether the power is in gross appendant or simply collateral: Sugden on Powers, 182, 4 Kent. Com., 325. She is merely an instrument, and the appointee claims under the settlement: Watkins Conv., 271. As long as she pursues the mode prescribed, courts of equity have no special jurisdiction over her acts, except, perhaps, to aid a defective execution, etc.

The second principle is applicable in all its force, when her acts are considered by a legal forum, and if valid there, they are, of course, valid in equity.

A prescribing settlement may well be likened to the Married Women's Acts of many of the States, prescribing the mode in which they shall dispose of or encumber their separate estates. A brief consideration of the general effect of these is not out of place, for other obvious reasons as well. That a merely prescribing act does not exclude the jurisdiction of equity over the wife's contracts seems to be clear. In the case of *Love vs. Watkins*, 40 Cal., 547, the court say: "the provisions of the act concerning (married women's) conveyances, were not intended to interfere with or abridge the powers of a court of equity to compel the performance of contracts which are binding upon married women. . . .

"The object of requiring their contracts to be executed with certain formalities has often been held to be for her protection, and not to deprive her of any power over her separate estate. The statute concerning conveyances requires her to execute her conveyance in a certain mode, when the conveyance constitutes the evidence of the sale she has made; and the act concerning husband and wife requires the same formalities in any other contract affecting it. The object is to secure her perfect freedom of action and to preserve the evidence of the fact," and, it may be added, to perfect the transaction so as to give the person dealing with her rights which can be asserted at law.

So, in the case of *Phillips vs. Graves*, 20 Ohio St., 371, where it was insisted that the acts concerning the rights and liabilities of married women prescribe the only rules in relation to their separate property, the court say, "we have carefully considered these propositions, and have come to the following conclusion, to-wit: These

statutes do not, nor were they intended to, abridge the powers or restrain or bind the jurisdiction of courts of equity in relation to the separate estates of married women; but on the other hand, they do enlarge the jurisdiction of the Chancellors, in so far as the general property of married women is changed, by force of these statutes, to separate property. The legislative intention was to change the *legal* status of married women, and to declare their 'legal rights and liabilities.' The common law, in so far as its rules are incompatible with the provisions of these enactments, is abrogated or modified. The remedies therein provided may be enforced by courts of common law jurisdiction. And to the extent that courts of law are by these statutes invested with a remedial jurisdiction heretofore exercised by courts of equity exclusively, the remedies are cumulative and the jurisdiction concurrent:" Story's Eq. Jur., § 80; *Mitchel vs. Otey*, 23 Miss., 236; *Todd vs. Lee*, 15 Wis., 380; *Yale vs. Dederer*, 18 N. Y., 265, are cited.

The views of Chancellor Kent have been followed in many of the States, including Tennessee, and the array of discordant cases is truly formidable; but before examining some of them, I will proceed with the principal New York cases.

The principle so distinctly announced by Ch. J. Spencer and Judge Platt in overruling Chancellor Kent, has not been logically pursued in that State. In *North American Coal Company vs. Dyett*, 7 Paige, 9, the Chancellor says: "the *feme covert* is, as to her separate estate, considered a *feme sole*, and may in person or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate or for her own benefit upon the credit of the estate." Under the principle even though the debts were not contracted for the benefit of the estate or upon the faith of the estate, it should nevertheless be bound if they were her debts fairly contracted. The qualification is agreeable to the later English cases cited from Benjamin on sales *supra*, and perhaps is just, but one departure from principle generally begets another, as will be seen presently. This case seems to have been affirmed in the court of errors, upon principle, Justice Cowen saying: "where her separate estate is completely distinct, and, as here, independent of her husband, she seems to be regarded in equity, as respects her power to dispose of or charge it to all intents and purposes as a *feme sole*, except so far as she may be expressly limited in her powers by the instrument under which she takes her interest."

But in the case of *Yale vs. Dederer*, 18 N. Y., 265, a step was taken which initiated confusion. In this case, Mr. Dederer had bought a lot of cows of plaintiff, who refused to complete the sale unless Mrs. Dederer would join in the note for the purchase money. This she did. Upon failing to make the money out of the husband, under execution, the plaintiff brought his action against the wife to charge her separate estate. The judge, at the special term, charged her estate with the payment, and this was affirmed at the general term, but reversed in the Court of Appeals by a divided court—Judges Denio and Roosevelt dissenting, and Judge Strong, though present, not voting. Judge Comstock delivering the opinion of the majority, reversed the judgment of the general term on the ground that the mere signing of a note by a married woman, not in fact for the benefit of her estate, but as surety for another, and *not declared in the note* to be for her benefit, and where she had *not professed in the contract* to charge such estate, did not operate as a charge upon her estate. The principle here was evidently departed from. No process of reasoning can sustain this case under the principle which had been adopted.

The same case came shortly afterwards again before the Court of Appeals (22 N. Y., 450), and it appeared from the findings, in addition to the facts developed on the former trial, “that Mrs. Dederer intended to charge, and did expressly charge, her separate estate for the payment of the note.” The court held, that in order to charge the separate estate, the intent to do so must appear from the very contract, which is the foundation of the charge, or the consideration must have been obtained for the direct benefit of the estate itself. The decision in this case was at variance with the prior cases and directly contrary to the English rule, which the court in *M. E. Church vs. Jacques*, in error, and *North American Coal Co. vs. Dyett*, professed to follow. Upon what principle it is based is inconceivable, unless it be upon the idea of its operating as an appointment under a power delegated by the instrument; and this is inconsistent with the view of the married woman’s power in equity maintained in the prior cases.

Mr. Schouler, writing of this case, says: “This late case is an important one, as establishing in a leading American State, under cover of legislative policy, a new doctrine altogether at variance with that of the modern English equity courts and contrary to its own precedents, that in Wisconsin it has been unsparingly con-

demned;" Dom. Rel., 229, 230; *Todd vs. Lee*, 15 Wis., 365. Judge McIlvaine, in *Phillips vs. Graves* (20 Ohio St., 371), thus comments upon it: "This rule is in conflict with the English doctrine, as we have seen, and it is believed to be in conflict with the decisions of every State in the Union where the *jus disponendi* is held to be incident to the separate estate of married women."

If the powers of disposition were exercisable only within or under a power of appointment contained in the instrument creating the estate, and by its terms limited to appointments by writing only, the New York rule would undoubtedly be right. But, inasmuch as a separate estate is created, where no power of appointment is granted by the terms of the instrument creating it, we believe that for the sake of its enjoyment in accordance with the intent of the grantor, the power of control and disposition attaches of necessity under and by virtue of the general laws of property, unless restrained by the terms of the instrument. And if the *jus disponendi* attaches, without limitation or restraint, we believe with Lord Brougham, in *Murray vs. Barlee*, that we are not authorized "to invent a new chapter in the statute of frauds, and declare that the only mode of exercising such a power shall be by a written instrument. And if a writing is not necessary to evidence the intention of a married woman to charge or dispose of her separate estate, we fully agree with Lord Cottenham, in *Tullet vs. Armstrong* (4 Mylne & Craig, 377), that such intention may be shown by parol."

It having been held in *Yale vs. Dederer*, that in order to charge the separate estate the intention to do so must not only exist, but also be declared in the very contract which is the foundation of the charge, it would be but consistent to hold that the separate estate must also be described in the same contract. Accordingly, the question soon arose on the following indorsement of a note: "For value received, I hereby charge my individual property with the payment of this note. Armina Babcock." The Supreme Court of New York held her not liable, because the indorsement contained no description of the property intended to be charged. But the commission of appeals reversed the decision after a review of the principal New York and English cases: *Corn Exchange Insurance Co. vs. Babcock*, 42 N. Y., 613. It seems that the decision of the Supreme Court was the legitimate offspring of *Yale vs. Dederer*, and that that case is virtually overruled by the commission of appeals, though it was not so declared, but, on the contrary, directly recognized. The reasoning of Hunt, Commissioner, who delivered

the opinion of the commission, is negative in its nature. He says: "Among all the cases, there is not one that holds, that, where a married woman having separate property incurs a liability, for which she declares at the time of incurring it, and in the instrument by which it is incurred, that her separate estate shall be held, the separate property does not become charged; at least, I may say, after diligent examination, that I have met with no such case, either in the English courts or those of the last resort in this State. There are several, however, in which the precise objection has been made and overruled. There is no more propriety in the principle sought to be sustained, than there would be in holding that the promissory note of a male adult must describe the property seized on execution issued on a judgment recovered upon the note."

Was there not as much propriety in the doctrine maintained in the Supreme Court, that the property should be described in the note, as there was in the doctrine enunciated in *Yale vs. Dederer*, that the intent to charge the property must be specified in the note? In concluding his opinion in the last noticed case, the commissioner briefly states the English and New York principle. He says the ground upon which the married woman's separate property should be held liable, may well be rested upon the principle of *jus disponendi*; that the law gives her the practical ownership of the property; that as she has the power of dealing with it at pleasure, she has, therefore, the power to bind it for the payment of her debts. This covered the whole case and exhausted the argument, but it was an admission fatal to *Yale vs. Dederer*, and one which rendered useless his own review of the cases. The legislative enactments of New York had nothing to do with the decision of the two last cases, or any of them, beyond the kind of action to be brought and the forum. This is expressly decided by the commission of appeals in the above case. It is said: "it will be observed that these statutes contain the expressions, 'her separate property, as if she were a single female,' and 'to her separate use in the same manner and with like effect, as if she were unmarried.' The condition of a married woman holding property to her separate use as if she were a *feme sole*, was well understood in the jurisprudence of this country at the time of the passage of these acts. It had been in use in England and in this country for a long time. It had been the subject of leading determinations for more than a hundred years. When the legislature use this well-known description, they use it

with reference to its equally well-known meaning. To ascertain, therefore, whether a married woman can now and here subject her separate estate to the payment of a debt like that before us, by an instrument like that before us, we must refer to the former adjudications respecting a married woman who held property as if she were a *feme sole*."

It is not a little discouraging to find that the Supreme Court of Massachusetts, after a lengthy discussion of this subject, conclude that *Yale vs. Dederer* contains a good exposition of the law. In a recent case, this court say: "And we think upon mature and full consideration, that the whole doctrine of the liability of her separate estate to discharge her general engagements, rests upon grounds which are artificial and which depend upon implications too subtle and refined. The true limitations upon the authority of a court of equity in relation to the subject, are stated with great clearness and precision in the elaborate and well reasoned opinions of the Court of Appeals in New York, in the case of *Yale vs. Dederer*, and our conclusion is, that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or where the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income to the extent to which the power of disposal of the married woman may go. But when she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate unless an express instrument makes the debt a charge upon it:" *Willard vs. Eastham*, 15 Gray, 328, per Hoar, J.

It is refreshing, however, to turn to the decisions of South Carolina, where the second principle has been adopted and followed, and find an unbroken line based upon tangible reasons.

In *Ewing vs. Smith*, 3 Desau, 417, which arose in 1811, Chancellor DeSaussure, in a laborious and elegant opinion, which has often been contrasted with that of Chancellor Kent, in *M. E. Church vs. Jacques*, reviewed the English cases and concluded that they established the position, that in equity a married woman is to be held a *feme sole* unless expressly restricted; and he held the separate estate liable for a bond executed by husband and wife. But he, too, was reversed in the Court of Appeals, and the very opposite doctrine established, which has not since been departed from. A majority of the Chancellors declared the rule to be that a *feme covert* has no

power over her separate estate but what has been expressly given to her by the instrument of settlement, and that any power so given must be strictly pursued.

A case occurred in this State in 1845, which afforded a good test of the principle adopted by the Court of Appeals. An estate was settled to the separate use of a *feme covert* to be at her *full and free disposal*, and the court held that it was not chargeable with a note executed by her and her husband. Harper, Ch., delivering the opinion of the court, said: "If anything can be considered as settled, it is the settled law of this State, that when property is given or settled to the separate use of a married woman she has no power to charge, encumber, or dispose of it, unless in so far as power to do so has been conferred on her by the instrument creating the estate, which power must be strictly pursued; in contradiction to many English cases in which it has been held that she is a *feme sole* with respect to her separate property, and may charge and dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument. This has been the settled law since the decision in *Ewing vs. Smith*, followed by a great number of cases decided in conformity to it, for a period of more than thirty years, and without any decision impugning or conflicting with it. . . . Though it has sometimes been said in relation to our doctrine, that a married woman is only a *feme sole sub modo*, or to the extent that the settlement makes her so. Yet *these expressions are inaccurate*. She can in no manner of respect be considered a *feme sole*. A *feme sole* disposes of or charges her property by her own act and according to her own will, by her inherent power as owner. A *feme covert* exercises a delegated authority, and can not exceed it. She is enabled to execute a power, as in some instances, any third person, *feme covert* or other, even those having no interest in the property, might be enabled to execute it, and bind her by their act:" *Reid vs. Lamar*, 1 Shobhart Equity, 27, 37.

In the<sup>9</sup> Supreme Court of Ohio, in the late case of *Phillips vs. Graves*, (20 Ohio St., 371,) the subject is well considered by Judge McIlvaine. He follows, with a slight modification, *Hulme vs. Tenant*, and the later English cases. The English rule is stated to be, that courts of equity, upon the principle that the *jus disponendi* is an incident to the absolute ownership of property, will charge the separate estate of a married woman with the payment of debts arising upon her general engagements, whether verbal or in writing,

when her intention so to charge them is either express or implied, unless she is restrained by the terms of the instrument creating the separate estate, from exercising such power of disposition. He concludes: 1. That a married woman, possessed of a separate estate of real or personal property, may charge the same with her debts, at least, to the extent that the liabilities may be incurred for the benefit of the estate or for her own benefit upon the faith of the property. 2. That such power is incident to the unqualified ownership of property, and is only limited by the terms of the instrument creating such estate, or by implication arising therefrom. 3. That the intention to charge her separate estate at the time her liability was incurred, may be either express or implied. 4. That such intention may be implied from the fact that she executed a note, bond or other obligation for the indebtedness.

Without their qualifications, these conclusions, reached after quite an elaborate review of English and American cases, are but the logical results of the first principle. The qualifications, as to the benefit of the estate, or her own benefit, and her intention, are added without reason or principle, and this fine opinion would not have been open to criticism if it had been stated that they were imposed by the powerful arm of a court of equity, simply for the protection of the wife.

However, if this case is adhered to, it is not likely that much trouble will arise in settling all questions arising on the subject in Ohio.

The Supreme Court of Missouri have adopted the first principle, and with the exception of a single slightly jarring case, it seems have decided the cases upon it. In referring to the cases at hand from the different States, bearing upon this subject, it was with no slight gratification that I discovered the recent case in this State of *Miller vs. Brown* (47 Mo., 524). This was an action to charge the separate estate of Mrs. Brown, a married woman, for a bill of goods bought of plaintiffs. The defense was threefold: First, that Mrs. Brown did not intend to charge her separate estate. Second, the goods being necessities which the husband was bound to furnish, it could not be so charged; and, third, that it could not be charged by a verbal agreement.

The Court, per Bliss, J., say: "In contracting a debt it is not necessary that the wife say anything about her estate, or even that she have it specially in mind. The question is, whether the contract was her own or that of her husband. If she made it for

herself, in her own name, then her intention is presumed, unless her acts at the time, as by the giving and acceptance of some other security in lieu thereof, show the contrary. A promissory note would clearly establish the contract to be hers, but if she furnish no such evidence, the fact that it was her own contract must be otherwise shown, and, when shown, the intention follows. Mrs. Brown's declaration that she did not intend to charge her separate estate, when running up a bill in her own name, and upon her own credit, would not relieve her estate from the charge thereby created. The law upon this subject has been often and fully discussed by members of this Court, and it has always been held that, as to her separate property a married woman is to be regarded as a *feme sole*, and is competent to make contracts or contract debts that shall bind it in equity, whether such property be named or referred to, or not: *Coates vs. Robinson*, 10 Mo., 457; *Whitesides vs. Cannon*, 23 Id., 457; *Tuttle vs. Hoag*, 46 Id., 38; *Schafroth vs. Amba*, Id. 114. In *Kimm vs. Weippert*, 46 Id., 532 (the slightly jarring case alluded to), the circumstances were held to rebut the presumption of intention. The practical question, then, is not whether the *feme covert* expressly designs to charge her separate property, but whether she intends to contract a debt of her own, for if she does so, the law, and not her ideas about property, fixes the liability."

In regard to the second plea, that the articles were necessities which the husband should furnish, among other things, the Court say: "In an action against the husband, the right of the wife to bind him would be very material, but as against her property, if it clearly appears that the credit was solicited by her for herself, and given to her, her husband being unknown in the transaction, it does not matter whether he ought to have furnished the goods or whether she could have availed herself of his credit, if he had any. She may become surety for her husband, may execute her note or bill to raise money for a hazardous speculation, or for frivolous amusement, but if she be in need of the necessities of life for herself and children, is she to be shorn of credit because the husband refuses to furnish them, and has no credit of his own, of which she can avail herself, and go without until she can convert her estate into money?"

Upon the third point, that the estate could not be charged by a verbal agreement, the Court say: "It has been held by many Courts that the wife's realty can not be charged for a liability not evidenced by a writing, while others repudiate any distinction in that

regard between a written and parol agreement. These opposite views are consistent with the different theories upon the general question adopted by the different Courts, and, in order to decide which view is correct, *we must fix upon some principle as a guide to our steps.* The two leading theories are, that, as to her separate estate, the wife is a *feme sole*, that she may contract debts as though unmarried, for the payment of which her property is holden, and, upon this theory, it can not matter whether the debt be evidenced by a written instrument or not, if it is established to be her debt. The other theory is, that the grant of a separate estate does not give the wife a general credit based upon it, but simply a right of disposition, a power of appointment, uncontrolled by the husband, and she can only execute the power in accordance with its terms. Most of the opinions sail between these two theories, now tacking toward one and then the other, but, unless the whole subject shall be rendered obsolete by the complete enfranchisement of married women, in regard to their property and power of making contracts, through the adoption of the doctrines of the civil law, *one or the other of these theories must ultimately prevail with all its logical results.* Missouri, as we have seen, has adopted the first theory, and no case has yet arisen where its legitimate corollaries have been denied." This doctrine has received further confirmation by the very recent case of *Lincoln vs. Rowe*, 51 Mo., 571-4, and the question seems to be definitely settled upon principle. We have seen that in South Carolina, where the very opposite principle or theory has been adopted and logically followed, uniformity of decision has also been attained.

In conclusion let us turn to the Tennessee cases. The leading case in this State is *Morgan vs. Elam*, 4 Yerg., 375, in the argument and decision of which, covering nearly one hundred pages, there was arrayed, perhaps, the finest legal talent the State has ever produced. After a most elaborate discussion, both by the counsel and the Court, the views of Chancellor Kent in *M. E. Church vs. Jacques*, were adopted by a majority of the Court. It was held that a married woman is to be considered as a *feme sole* in relation to her separate estate only so far as the deed made her such—that the meaning of the deed is to be regarded in order to ascertain what power she has over her estate, and that the pointing out a particular mode of disposition is an implied restriction against any other.

No principle was adopted, or standard erected to which, as a premise, every case might be referred. Each case was left to be

governed by the intention of the settlement, and if the instrument was silent as to the mode of disposition, it was left almost at the discretion of the Court. In *Porter vs. Baldwin*, 7 Humph., 175, Judge Green, who delivered the prevailing opinion in *Morgan vs. Elam*, says, in reference to this case, "the principle is laid down that we must ascertain by a fair construction of the deed what was the intention of the grantor, and cause that intention to be carried into effect. Upon this principle, the power of alienation is not to be restricted, on the one hand alone, to cases where it is expressly conferred, nor, on the other hand, does it exist in every case where it is not expressly prohibited, but the powers of the wife over the property, and the use she may make of it, must depend upon a fair interpretation of the meaning and intention of the settlement." In this case the deed of settlement was not before the Court, but it was held that it must be presumed to settle the estate upon her without restriction. The bill which was taken for confessed, alleged that complainant had rented a house to the wife upon her agreement that he should look to her for the rent out of her separate estate, and that she had promised in writing to pay the amount due. The Court held that the fair interpretation of such a settlement was that the separate estate should be available for her support, and liable in equity for necessities.

In *Litton vs. Baldwin*, 8 Hump., 209, the same settlement came again before the Court, but this time it was set forth. The deed reserved to Mrs. Baldwin "full power and authority by her directions in writing, in the presence of one or more witnesses, to alienate, sell or dispose of, in any manner she might think proper," the property settled to her separate use. She bought furniture at a Clerk and Master's sale, and gave a note, with Return J. Meigs as security for the purchase money. The bill, filed to enforce payment out of her separate estate, was dismissed, the Court citing *Morgan vs. Elam*, and saying that a married woman can exercise no authority or control over her separate property except such as is specially given in the deed, and only in the mode therein prescribed; that the execution by a married woman of a promissory note or other contract, without reserve, is not sufficient to charge her separate estate, that there must be proof of an express agreement and intention to charge.

Two decisions of the Supreme Court were not sufficient to explain the powers and liabilities of the wife, under this settlement, and it came again before the Court in the case of *Hoggart vs. White*, 2

Swan, 265. In this case, the Court held that a mortgage of a slave, part of the separate estate, executed by her, would be enforced against her; that, as the settlement gave her power to "alienate, sell or dispose of" the property, as she saw proper, this included the power to mortgage.

In *Powell vs. Powell*, 9 Hump., 477, Judge Turley says: "A *feme covert* acting with respect to her separate property, is competent to act in all respects as a *feme sole*." But, in view of the prior decisions, this can only be true in this State, if at all, when the settlement is silent as to the power of disposition. The statement of Judge Turley is *obiter*, but it shows how unsettled were the ideas of our most learned judges on this subject.

The Tennessee cases are well reviewed by Judge Andrews in *Young vs. Young*, 7 Cold., 461. He considers that the cases settle only these propositions:

1. That the power of disposition possessed by a *feme covert* over her separate estate is determined by the intention of the person granting or devising the estate, to be ascertained by a fair construction of the deed or will.

2. If the instrument creating the separate estate contains any express or implied restrictions upon the power of disposition, either as to the mode of conveying, or the purpose for which it may be conveyed, she can convey it in no other manner and for no other purpose.

3. When a general power of disposition is by the instrument of settlement expressly conferred upon a *feme covert*, without restriction or limitation as to mode or purpose, she may convey the estate as a *feme sole*, by proper instrument of conveyance.

He says, that when the settlement is silent as to her power, and no mode of disposition is pointed out, the property being conveyed simply "for her separate use," that these words have no common nor technical meaning which indicate an intention to restrict the powers of the wife, that it would probably occur to but few, if any persons, not lawyers, that these words could imply any such intention. This is consistent with the reasoning of Judge Green in *Porter vs. Baldwin*, *supra*, but at war with all the cases which hold that the wife has no power except what is specially granted to her. He says none of the cases reviewed by him involve or decide the question of the power of a married woman to dispose of her separate estate in realty, not as a *feme sole*, but as a *feme covert*, by deed executed jointly with her husband and privily acknowledged

under the statute; and as the deed in the case before him was entirely silent as to the mode of disposition, and her conveyance was, under the statute, with her husband, he held it good. He admits that the statute, as a substitute for fine and recovery, neither gave her a new power of disposition, nor took from her any power, but contends that as at common law, by fine or recovery, she could convey her real estates whether legal or equitable, she could also in these modes dispose of her separate estate permitted to be held by a court of equity. This argument is ingenious, but I do not think it is applicable; for if a married woman could have conveyed her separate estate in equity as a *feme sole a fortiori* would a recovery suffered, or a fine levied at law, be held good in equity; but if she could not in equity convey the estate which she held by sufferance of equity, so much the less would her conveyance at law by any mode whatsoever be held good. But aside from this question, the court was of opinion that as the property was for her separate use, and the deed silent as to her power, the wife was competent to convey from the presumed intention of the grantor.

In the case of *Gray vs. Robb*, 4 Heisk., 74, the language of the settlement was: "To have and to hold said lot to said Lucy F. Gray, her heirs and assigns forever, to the sole aid and behoof of the said Lucy F., and her heirs forever." The court, per Nicholson, C. J., held that the words "sole aid and behoof," vested in the wife an estate for her sole and separate use, and that a conveyance of the lot by her husband and herself, with privy examination under the statute, was a nullity. The case of *Young vs. Young*, seems not to have been called to the attention of the court, as it was not noticed. The case was very briefly disposed of, the court saying: "Upon the well-settled rule in this State, a married woman has no other power to convey or dispose of her separate estate than that given to her by the instrument which conveys to her the separate estate. If the instrument gives her no power she can exercise none:" citing 4 Yerg., 375; 8 Hump., 159; 1 Swan, 488; 5 Sneed, 450.

The case of *Head vs. Temple*, 4 Heisk., 34, also affords a striking example of the difficulty of determining the power of the wife from the intention of the grantor merely. A "marriage contract" which recited that the parties have agreed to execute a contract whereby the property of Gulielma D. Temple shall be protected and assured to her own sole and separate use, free from the debts or claims of the creditors of the husband, conveyed real and personal estate to Lucien M. Temple, the intended husband, in trust for the

sole and separate use of the said Gulielma D., and her heirs forever, free from the claims of any creditor of the said Lucien M., and free from his power of disposition, except with the consent and concurrence of the said Gulielma D., and concluded with these declarations: "It being the real intention of this conveyance to continue the said Gulielma D., in reference to her said property, a *feme sole*, to all legal intents and purposes. It is further understood, that the power is expressly reserved to the said Gulielma D. to dispose of all or any of her property, as well of what is above described, as of her real estate by last will and testament, or by deed of gift, and if she shall fail to do so, then it shall descend to her heirs, and in case she shall die without children, or issue, it shall belong to the said Lucien M. Temple, in the event he survives her; but her right to dispose of the same as aforesaid, in any way which she may choose, is in no event to be impaired or restricted." The court held, per Turney, J., that the settlement did not confer a right to mortgage the lands to secure a note made by husband and wife.

The head note of *Shacklett vs. Pope*, 4 Heisk., 104, is as follows:

"It seems that a wife's separate estate may be charged with expenditures for the benefit of the estate. But a wife having a separate estate in land in Tennessee and also in Mississippi, the court refused to charge the Tennessee lands with expenditures for the benefit of the Mississippi estate."

What powers were granted to the wife, if any, by the settlement, does not appear. The court drew a distinction between the general debts of the wife and those contracted for the benefit of the estate and upon its credit, and a fair inference from the whole case, which is lengthy, is, that the latter class of debts will be enforced against a married woman's estate by our present Supreme Court.

With this cursory view of the Tennessee cases it but remains to see what effect the late act of the Legislature has upon the subject. The sections bearing upon it are as follows: (Act of 1869-70, ch. 99.)

SECTION 1. Married women over the age of twenty-one years, owning the fee or other legal or equitable interest in real estate, shall have the same powers of disposition by will, deed or otherwise, as are possessed by *femes sole*, or unmarried women.

SEC. 2. The powers of said married women to sell, convey, devise, charge or mortgage their real estate, shall not depend upon the concurrence of the husband, or his consent thereto; *Provided*, her privy examination to any deed, mortgage or other conveyance, shall

take place before a Chancellor, or Circuit Judge of this State, or Clerk of the County Court.

SEC. 3. *Femes covert*, or married women, owning a separate estate settled upon them and for their separate use, shall have and possess the same powers of disposition by deed, will or otherwise, as are given by the first and second sections of this act; *Provided*, the power of disposition is not expressly withheld in the deed or will under which they hold the property.

SEC. 6. The provisions of this Act, except the provisions of the third section of this Act, shall apply to and embrace only such *femes covert*, or married women, as have abandoned their husbands, or who may refuse to live or cohabit with their husbands, or whose husbands may be *non compos mentis*, insane, or of unsound mind, and also to such married women, or *femes covert*, whose husbands may fail or refuse to cohabit with, or have abandoned, such married women or *femes covert*, etc.

It is to be regretted that this Act, was not more explicit and independent of that part of it relating to married women of the class mentioned in the sixth section. Trouble may arise in its construction. The Legislature was doubtless painfully aware of the confused condition of matters, and intended to give the married woman full power to dispose of her own separate property, unless the settlement expressly restrained it, and to abolish the rule adopted by the courts of looking to the settlement for affirmative powers to be ascertained from its supposed meaning.

There is no doubt of her *power*, unless restrained, to make any charge upon, or disposition of, her estate she pleases. All she has to do is to properly execute an instrument. But the troublesome question is, How are her contracts and engagements, made by her without her husband's concurrence or consent, or not authenticated by privy examination, to be viewed in a court of equity? By what principle will this court be governed in deciding such questions? I am of opinion that a proper construction of the Act will allow them to enforce every contract or engagement fairly and voluntarily entered into by her upon her own credit, or that of her estate, whether the contract or engagement be for her own benefit, or that of her estate, or not. The *jus disponendi* has been given her by statute, and the courts have no longer to look to the instrument of settlement except to see that her power is not restrained. The proviso of the second section will be sufficiently operative, notwithstanding the absolute power granted in the first section, by holding

valid, in a court of law, all such instruments as are executed according to it; and the first section is made fully operative by courts of equity taking jurisdiction to enforce all other contracts and engagements whenever fairly and voluntarily made.

A contrary view of the statute would be inconsistent with the first section, which gives the married woman the same powers as an unmarried woman; and unless the very opposite principle was adopted there would be none upon which to proceed. The intention or meaning of the settlement could not be looked to, to ascertain her power, for she had the power; she has simply failed to exercise it in the mode laid down in the statute.

The construction contended for is sustained by what has been quoted and said above in relation to the married women's acts, and also by analogy from the contracts of male adults, which may be enforced by laying hold of their real or any other estate. It will be equitable and just; for there ought to be no distinction except as to priority of satisfaction, perhaps, between engagements or contracts fairly entered into, but not secured by mortgage, and those of the same nature so secured. And finally, this construction will, I feel confident, afford a solution to most of the questions constantly arising on the subject.

EDMUND S. MALLORY.

Jackson, Tennessee.

## *The Slaughter-house Cases.*

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Perhaps no people among all the civilized nations of the earth will suffer themselves to be imposed upon with as little resentment as the American people. Vast fortunes are made here with so little effort, and in so short a time, that men suffer themselves to be robbed without a murmur, day by day, of that which, being so easily obtained and so lavishly used, they hold so lightly. That patriotism which in many countries has swallowed up the ambition for individual advancement, in the great desire for the progress and welfare of the nation, is, practically, but little known to us. Not that we are so peculiarly selfish, but as a general rule, individual enterprise is so lucrative that it seldom becomes necessary, in order to carry out business projects, for men and means to be combined, as is the case in older and less active countries. In this way men become accustomed to the damaging influences of "letting alone" for the sake of being "let alone." It is rare that we find men of unprejudiced thought and deed. To become the advocate or supporter of some party, about whose doctrines they know, practically, but little, and care, in their secret hearts, less, seems to be the unavoidable destiny of the American people. To see nothing bad in their own, and nothing good in their opposing party, has been the one strange but characteristic feature of American politics since party system was inaugurated, and thus, it seems, it must go on until the end shall come. No stone is left unturned that will bolster up the party walls, and that too in utter disregard of the fact that time and time again this reckless, and may be, mistaken zeal is seriously jeopardizing the nation they claim to love so well. Men are not elected to office because of their ability, but because of their fidelity to party interests, and party, not national, good is the criterion by which official life must be squared.

Perhaps all these things might have worked out for the ultimate good of the people, especially in a government where three sources of power checked and balanced the administration of the law, could only one of them have been kept unspotted. Since the erection of our National Constitution, the history of the people has been a history of faith in the ultimate reliability and efficacy of the supreme judicial tribunal of the nation. But this has been taken

away, and the more observant and thoughtful of the people see no obstacle in the way of any continuous effort to break down the workings of our institutions. With but few voices raised in dissent, the American people have received, and adapted themselves to, rulings of the Supreme Court since the war, the very boldness and flagrancy of which have seemingly crushed out any opposition. As a matter of curiosity, we will call attention to one of the most noted cases of indifference upon the part of the American people as to what is done to, or with, them.

The special attention directed in the caption to the *Slaughter-house Cases*, is because the principles there laid down are but little known or appreciated by the general public. The *Legal Tender Cases* are more widely and fully known. It may not be improper to observe just here, that the likelihood of the decisions in these cases being overruled is no extenuation of the injury they work. The very basis of the claim for respect for this Court is placed upon the stability of its rulings, and the oftener they are overturned the oftener will public confidence in the Court be shaken.

On the 8th day of March, 1869, the Legislature of Louisiana passed an act incorporating "The Crescent City Live Stock Landing and Slaughter-house Company," the said act to take effect on the 1st day of June following. Without giving the whole text of the Act in detail, we catch from it enough of its general purpose to give an accurate idea of it.

The ostensible purpose of the act was to "protect the health of the city of New Orleans," but was in reality to place in the hands of the Live Stock Company the exclusive control of all the slaughtering and penning of stock for the use of the New Orleans market. The following extracts from the act will suffice to show its general tenor: . . . "The sole and exclusive privilege of conducting and carrying on the live stock landing and slaughtering-house business within the limits and privileges granted by the provisions of this act, . . . the exclusive privilege of having landed at their wharves or landing places, all animals intended for sale or slaughter, in the parishes of Orleans and Jefferson, . . . the exclusive privilege of having slaughtered therein all animals, the meat of which is destined for sale in the parishes of Orleans and Jefferson.

. . . All other stock landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it will no longer be lawful to slaughter cattle, hogs, calves, sheep or goats, the meat of which is destined for sale within the parishes

aforesaid, under a penalty of \$100 for each and every offense, recoverable with costs of suit before any court of competent jurisdiction; that all animals to be slaughtered, the meat whereof is destined for sale in the parishes of Orleans or Jefferson, must be slaughtered in the slaughter-houses erected by said company or corporation . . . and the said company shall be entitled to the head, feet, gore, and entrails of all animals, excepting hogs, entering the slaughtering-houses and killed therein, "was given to the corporation so created, for the term of twenty-five years." The act also specifies that the said company shall receive as compensation for all beeves, \$1 each; for all hogs and calves, 50 cents each; for all sheep, goats and lambs, 30 cents each. It will also be borne in mind that the combined parishes of Orleans, Jefferson and St. Bernard contained an area of 1154 square miles, and a population of some two hundred and fifty thousand inhabitants, out of which number about one thousand persons were employed daily in the business of slaughtering and marketing animal food in these parishes. The people of Louisiana claimed that by this act a monopoly was created in violation of the provisions of the 13th and 14th Amendments to the National Constitution, the text of which is well known. "Neither slavery nor involuntary servitude . . . shall exist within the United States. . . . All persons born or naturalized in the United States . . . are citizens of the United States. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." After quite a number of preliminary trials, the cases were at last brought in proper form, and upon their merits, to the Supreme Court of the United States, and after laborious and able argument on both sides, the Court rendered its decision, sustaining the grant and declaring the act constitutional. Excepting the *Dred Scott* case and *Legal Tender Cases*, there is, perhaps, no case on the record of the Supreme Court where so much ingenuity was displayed in avoiding the manifest enormity of the act, and in attempting to find sufficient reasons for upholding it. Swayne, J., in his dissenting opinion in these cases, makes the following strong assertion: "A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country."<sup>1</sup>

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<sup>1</sup> Slaughter-house Cases, 16 Wall., 128.

Here was a population of two or three hundred thousand people, consuming millions of dollars worth of animal food yearly, in the commerce of which much money and many men were enlisted, and had been for a century, placed in the hands of one corporation, to be farmed out for its especial emolument. The clause in the act setting forth that it was to secure a better sanitary condition for the city of New Orleans, was but a flimsy pretext, seeing there were three large parishes comprehended in the grant, comprising an area of more than one thousand square miles, to all of which the prohibition extended. If the principle of the act be justifiable under the law of the United States, the State of New York can, if she see fit, grant to *one man* the exclusive privilege of erecting apparatus at convenient places, for cooking the animal and vegetable food for the whole State. It would seem, to even the common mind, that the idea of an enlightened and humane law inflicting such an enormity upon a people, merely because a venal Legislature saw fit to grant the right, is too preposterous for a moment's consideration, and yet Miller, J., in delivering the opinion of the Supreme Court in these cases, says: . "It is not true that it deprives the butchers of the right to exercise their trade or *imposes upon them any restriction incompatible with its successful pursuit.*"<sup>1</sup>

Is this true? Most certainly not. Here, as the proof showed, were something like a thousand persons who had embarked their capital and enterprise in this pursuit, furnishing animal food over a district containing hundreds of square miles, numbers of them affecting in no way the sanitary condition of the city, upon the protection of which was based the need of the act. They must abandon their places of business. Their yards and slaughtering appointments were rendered valueless to them, and they were required to pay a royalty for the use of the houses, yards and places of the favored company at *its* place of business. Would not the whole purpose, as claimed for the act, have been subserved with equal effect by requiring all the slaughtering to be done outside of certain limits? Most assuredly it would. If the corporation could provide suitable buildings "within the corporate limits of the city, below the United States barracks," for the purpose of slaughtering all the animals kept and killed for sale in three parishes, how could the city be affected by the erection of such places entirely outside the limits of the city, and far enough from it not to affect it at all?

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<sup>1</sup> The italics are ours. 16 Wall., 60.

In spite of the specious argument both of the council and court in support of its ruling, the bald fact stands out with unmistakable distinctness, that the whole purpose and intention of the act was to create just what it did—a monopoly; to grant just what it did—exclusive privileges, and for the express benefit of the company incorporated. So much for the wisdom of the act. But the act was clearly unconstitutional, because in two aspects of it, it violated the express provisions of the two amendments named.<sup>1</sup> The 14th Amendment guarantees equal protection, under the laws, to all the citizens of the United States. Now, were not the very terms of this act violative of this provision? But much more does it trench upon that portion of the same amendment which secures the property, privileges and immunities of all the citizens of the Union. No one will attempt to advance the idea that these Amendments of the Constitution of the United States were intended and are for the sole benefit of the African race; and if words mean anything, these words must mean that no “privileges” shall be given and “immunities” secured to one or more citizens, whether black or white, of the United States, that shall not be participated in by the remainder of the population. How did this act operate? As before stated, the appliances and appointments of all the butchers in three parishes were to be abandoned, under penalty, and the whole business thrown into the hands of the slaughter-house company. In other words, the exclusive control of the slaughtering business of all this district, and the profit arising therefrom, were given, outright, to the company. Manifestly, this was a stretch of the police power of the State, and a grant it had in nowise power to make. The pursuit of preparing and vending animal food, was a calling that might be enlisted in by any citizen, at will, and not such a privilege as could be controlled and farmed by the State. Notwithstanding this, and the further fact, that these men must give up their places erected and used for preparing and marketing animal food, they were also required to pay a fixed revenue to the company for the privilege—of doing what? Carrying on the legitimate business in which they had embarked, over which the State had no more control than over the farming or merchandising carried on in the district. Was this not depriving them of the equal protection of the laws? Was it not taking away from them privileges and immunities they had just right to have protected under the paramount law of the land?

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<sup>1</sup> Constitution United States.

It was not necessary to go into a labored examination of the origin, history and necessity for the adoption of these Amendments. They were applicable to the nation at large, and their express provisions were violated. Who were citizens under the Constitution, had already been well defined. Their rights and privileges were jeopardized enough. But again, the very terms of the act boldly and unequivocally violated the law, in that it deprived these butchers of their property "without compensation" and "without due process of law." After having fixed the royalty to be paid the company for the use of its pens and slaughtering-houses, the act goes on to say that "the said company shall be entitled to the head, feet, gore and entrails of all animals, excepting hogs, entering the slaughter-houses and killed therein."<sup>1</sup> If these portions of the animals slaughtered could be given to the company in this way, then, on principle, the State has power to go further, and grant away the hides, the fat or any other portion it may designate. It is without semblance of law. The whole affair is justly denounced by Bradley, J., as "one of those arbitrary and unjust laws, made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished."<sup>2</sup> The prime significance of the term citizenship, under the Constitution of the United States, is, that it is confined to specific place. There is no such anomalous thing as a citizen of the United States at large. This citizenship of the United States is only reached through identity with some State or Territory within the Union; and when thus a privileged citizen of some such State or Territory, he becomes a citizen of the United States. It is true, that in matters of suffrage he may, at some time, exercise rights of citizenship of the United States that he could not, at the time, exercise as a citizen of the State.

Even under this liberal aspect of the term citizenship, the Amendments so often quoted, have secured to him, the citizen, all the fundamental rights and privileges of citizenship, independent of his identity with any particular State. Hence, the provisions of these Amendments were and are applicable to such cases as those under discussion, and if the provisions of the Act incorporating the slaughter-house company were, in any respect, violative of these Amendments, it was the duty of the Supreme Court to so declare, and relieve the citizens of the State of Louisiana of the burden of

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<sup>1</sup> 16 Wall., 42.<sup>2</sup> *Ib.*, 120.

so unjust a grant of exclusive privileges. And the failure of the Supreme Court so to do, is unaccountable, save upon the hypothesis of an unwarrantable desire to sustain a partisan Legislature and State Judiciary for the sake of party peace and unity. And we may well join Swayne, J., in the "hope that the consequences to follow this decision may prove less serious than the minority of the Court fear they will be."

Whatever may have been the controlling influence that operated upon the minds of the majority of the Court to induce them to render this decision, it is difficult to see how any enlightened and liberal student of law can sustain them in the view they took. A precedent has been established that may yet work untold injury to the people of the nation. If corrupt or ignorant State Governments are to be upheld in this wholesale and unlimited manner of legislating away the rights of the many and enriching the few at their expense, and that too when it is in the face of the express provision of the National Constitution, then our boasted institutions are a farce indeed. Here was a State Legislature composed, as was well and widely known, of the very worst elements of an ignorant and easily corruptible people, worked upon in such manner as caused them to grant these privileges in open disregard of the injury they were inflicting. Hundreds of men were deprived of their legitimate employment. Thousands of dollars worth of property, embarked by these men in handling and preparing meat-food for these large parishes, was rendered valueless, and both money and valuable portions of the animals already in store and to be handled in future, set apart, and taken from them by the State and given to the favored seventeen, without "just compensation," without "due process of law," and when they appealed to the courts for "equal protection under the law," it was denied in a most mortifying manner. If the Constitution is not broad enough and strong enough, and the Supreme Judiciary effective and reliable enough, to hold in check State Governments that thus abuse their powers, the prospect for peaceable possession of property is indeed gloomy. Large and wealthy corporations have for sometime maintained successful monopolies of the commerce and transportation of the country, and menaced the people with much more extensive and dangerous powers, simply because their large monied influence enabled them to defy both the legislative and judiciary departments of the government, but when the government shall have lent them its aid, it is time for the people to look about them for some

protection against these growing and dangerous evils. If the Government of the United States, speaking through its Constitution, and enforced through its Supreme Court, can no longer be looked to, to protect the people from these enormous grants of exclusive privileges, and the aid of this very Court can be invoked to sustain the grant of the sole privilege of penning, handling and slaughtering stock in three counties in Louisiana, we may yet see the day when men can not manufacture the commonest and most useful articles for their domestic consumption, without paying a royalty to some fortunate corporation. We have gone very far in this direction, when the Supreme Court of the United States can join the State of Louisiana in "widely departing from and entirely rejecting and trampling upon"<sup>1</sup> the equal rights of the people.

M. F. TAYLOR.

St. Louis, Mo.

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<sup>1</sup>16 Wall., 110.

## PRIVILEGE TAX.

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### NO. II.

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We quote the language of our Supreme Court in *Mabry vs. Tarver*, 1 Hump., 94. . . . . "But it is contended that the avocations in question, are not, in themselves, and in their nature, privileges. They are not so, indeed, unless prohibited in general by the laws. But when so prohibited, the license or permission to pursue them becomes a privilege, and the subject of the taxing power of the Legislature. The 7th section of the 11th article (8th section in Constitution of 1870) of the Constitution, which prohibits the Legislature from granting privileges or immunities, or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law, shows the sense in which the convention use the term. It is the license or permission upon the specified terms to do that which is prohibited. Such license or permission, as has been said, becomes a privilege, and the subject of taxation. But it is said, that to concede to the Legislature unlimited power to prohibit particular pursuits and avocations, in themselves indifferent or useful, and then to license them on specified terms, and tax the privilege, might make the pursuit of farming itself a subject of taxation. The danger is somewhat remote of the indiscreet exercise of such a power, but if it were to occur, the corrective would have to be applied by the people themselves in the exercise of the elective franchise."

We quote the clause of the Constitution referred to by the Court as proof of its construction of the term "privilege." "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges or immunities, or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law:" article II, section 8, Constitution 1870; section 7, Constitution 1834. Carrying this reasoning of the Court a little farther

we may say that the Legislature is prohibited from creating new individual rights and immunities, but there is no limit, except its own discretion, to its power to take away any and all the rights of any citizen or class of citizens. It can not give, except with impartiality, but it may take away as it will.

It is acknowledged by the very terms of this decision, that the occupation or avocation is only a privilege by the operation of the taxing statute. The statute finds it a right, transforms it into a privilege, and leaves it impoverished nothingness. The citizen has no rights that the Legislature is bound to respect. This finds him in the enjoyment of a natural right that existed before Constitutions and before Legislatures, the right to acquire property as the fruit of toil and energy, and industry. This right it takes away. The exercise of it is prohibited, and under the name of a privilege it is offered back under a lease for a year at a fixed price, to be paid in advance, and this is what our Court says is the "law of the land!" This construction of the Constitution clearly puts it within the power of the Legislature to prohibit any and every man from exercising his trade or vocation whatever it may be, by first taking away his right, and then fixing such a price that it is impossible for him to redeem it. The fruits of toil may not only be taken away, but toil itself is taxed in advance of its possible earnings, and prohibited. The best and dearest of our rights we hold only under a precarious lease at will from the Legislature. It is said that we have no remedy except in the elective franchise, and this is equal to none, for it can only come after the wrong is done. It is again equal to none, for it affords the minority no protection against the majority. While the farmers are in power we need apprehend no indiscreet use of the power against farmers, but the merchants, artisans, laborers and professional men may suffer. In case these classes should organize and form a combination against the farmers, then the latter would be in danger of feeling the weight of this dreadful evil. We give force to the very evils that constitutions are made to prevent. We reverse the whole machinery of constitutional law. We pick up constitutional limitations and use them as constitutional powers. We render void all guaranties that constitutions assume to put up to protect minorities, and place them as painted war-clubs in the hands of majorities, tempting the latter to the most flagrant abuses. One man is favored at the expense of his neighbor, and a third is spared that a fourth may be crushed, and yet this is the so-called "law of the land."

Under this construction of the language of our Constitution, no right that is worth the name is held inviolable or unalienable. If a constitution means anything except a useless and ornamental appendage to a form of government, and the intent of the framers of our Constitution is here rightly revealed, the document is a fraud, and ought to be binding only on the members of the convention. The people never intended to part with these rights. If this be the law of the land, it is a law of force and not of reason, right or justice. It is a rule of spoliation and not of taxation. We read of the ancient Lords of the Rhine who took away the property of traveling merchants, and sold it back to them for whatever sums they were able to pay as ransoms. Looking backward as to time, and eastward as to place, we call this rapine and plunder, and all such hard names. Among our own folk, at the present moment, we call a thing by the name of "merchant's tax," and "privilege tax," and "license," which is a wrong ten times more flagrant than was this custom in Gaul.

With all deference to the Justices of the Supreme Court, we believe this reasoning to be wholly wrong, and the deductions to be worse. The correctness thereof is only possible on the supposition that the Convention intended to reserve to the people none of the ordinary rights of freemen. The bill of rights and the very circumstances of the case render this proposition absurd. We are not without judicial authority for the contrary doctrine, and for what we hold to be in right, and in true reason, and in all the law books, the true doctrine. We cite our cases directly to the point. We quote with satisfaction the language of the Supreme Court of Arkansas: (*Stevens vs. The State*, 2 Ark., 291.)

. . . "But how is the keeping of a billiard table metamorphosed into a privilege? It certainly is not a right derived from or enjoyed by virtue of any grant from the government, nor is it enjoyed by a part and denied to others of the community. It is a right which, under our political organization, may be enjoyed as perfectly without as with the aid of a grant from the Legislature. It is strictly and emphatically a common right which can not be denied, though it may be so restricted and regulated by law as to prevent injury to others; but such law can only be enforced by the infliction of penalties and punishment on those who violate such legal restrictions or regulations. The Legislature has not the power of prohibiting any person from becoming a merchant, hawker, or peddler, until he shall have paid a tax as such, because it is parcel

of the public liberty of every citizen to employ himself or his capital in such manner as he may choose, provided he does not invade the equal rights of another. It is a primary and most essential principle of our Constitution that every citizen is by nature endowed with equal rights and equal privileges; consequently no individual in government does, or can have or possess any privilege which is not common to every other citizen of the State, until it is created by law and acquired by him under the authority thereof, and in the manner therein designated. The privileges contemplated in our Constitution are, in our opinion, such as can not be exercised or enjoyed by any citizen or other integral part of the whole community, without the intervention of some statutory provision granting to, or conferring upon, one or more individuals the right of doing some particular thing; as for instance, the right of banking, or keeping a ferry, or receiving tolls, and the like. A privilege, to be the subject of taxation, must legally exist before it can be taxed; that is, its existence must necessarily precede the tax, and not depend upon the condition of a tax being first paid before it acquires life and being. Otherwise the sum paid would be a bonus, or consideration, for obtaining the privilege instead of a tax upon the privilege. It would be the subject of stipulation and contract between the State and the party purchasing the privilege, rather than a legal imposition upon the privilege enjoyed. A right common to every citizen of the State can not, being first prohibited and then allowed to be enjoyed by such only as will comply with certain conditions prescribed by statute, be created a privilege, within the meaning of the Constitution, which may be subjected to taxation at the will of the Legislature. Although the Legislature has, constitutionally, the power of subjecting to taxation merchants, hawkers, peddlers and privileges, we are of the opinion that such tax can be imposed only upon merchants, hawkers and peddlers, who are actually engaged or concerned in the business of merchandising, hawking or peddling, and upon privileges created by law, and legally existing at such time as the law imposing the tax directs it to be levied thereon. We are, therefore, decidedly of the opinion that the facts presented by the record do not show a privilege enjoyed by the plaintiffs which, under the Constitution, could be made the subject of taxation as such, and that so much of the statute above quoted, as purports to impose a tax of five hundred dollars on the keeper of every billiard table in this State, for the period of six months, is in conflict with, and repugnant to, the

second section of the Constitution of this State, and therefore void." This is law that deserves the name. A privilege is some special favor that owes its existence to a legislative grant, an example of which was given in our former paper. It is a benefit derived from the Legislature, and not existing as a common right, independent of legislative enactment. When these common rights are made taxable, under rules that disregard the general laws of taxation as to equality and uniformity, they cease to be rights, and the very first principles of law are set at naught. The process by which money is extorted from the persons who follow these vocations is no more "taxation" than was Jack Shepherd a tax collector. When any court declares to the contrary, it declares in effect that we have no rights that are not alienable at the will and discretion of the legislative department of the government. From its reasoning to its conclusions, the decision of our own Court abounds in thoughts that are wholly repugnant to every sense of justice. The deductions are in violation of every principle of constitutional law. The decision in our sister State, under circumstances similar to those which we are considering, and under a similar Constitution, favors a rule of taxation that does not change, but equally distributes both its burdens and its favors. The doctrine announced by the Arkansas court is not new. It is older than Cooley, Story, Kent, Blackstone, Coke, or Puffendorf. It is as old as law itself. It savors of the "cold neutrality of an impartial Judge," and not of a Court driven to the sustaining of revenue laws at all hazards. The fact is that through poverty or extravagance, or from some kindred cause, our State government, like some profligate young gentlemen in the old days in England, for want of ready money, has been driven from legitimate fields to the "road." It is time that it should voluntarily reform or be brought to the gallows.

Our Constitution recognizes four subjects of taxation: Property merchants, peddlers and privileges. Each of them is something in being, and each must necessarily precede a tax levied upon it, for the same reason that a farm must be, before a tax can be levied upon it. These things and persons are selected by the Constitution, which says of them to the Legislature, them you may tax for all legitimate purposes under general laws of uniform and equal taxation. To argue that these terms, or any of them, may be varied in their meaning by the Legislature, so as to include this or that, which before belonged not to any of these four subjects of taxation, is begging the question. The language of the Court in *Mabry va*

*Tarver* is just what is necessary to prevent any argument in favor of the constitutionality of these acts. We mean no disrespect to the Court when we say that, in plain English, that sort of reasoning is contemptible nonsense. The idea that a Legislature may confer a privilege by simply declaring a certain right, over which it has no jurisdiction for the purpose, to be prohibited unless paid for, is absurd, and can not be made otherwise. We once knew a man who had read our Constitution, and had known but little of the practices here in respect to revenue measures, who refused to accept a valuable charter offered to him by our Legislature, because he knew that such a charter would be a privilege, and, as such, taxable, and he did not know what rate of tax might be imposed upon it from time to time. Poor man! He did not know that the Legislature could convert every right he had into a taxable privilege any day, without his knowledge or consent. He thought that a privilege is a privilege, and not a mere magic word by the use of which, in a statute, the Legislature may open the door of special taxation to any natural right, regardless of uniformity and of every other constitutional limitation. Under our want of laws the Legislature declares a right to be a privilege, and taxes it, first taking away the right that it may appear to be, under its sleight of hand, metamorphosed into a privilege. In like manner it may declare a farmer or a carpenter to be a merchant and tax him. It may declare a manufacturer to be a peddler, and tax him. It may declare a man's person to be personal property, and tax that. It may do any of these things to any extent. The only corrective would be afterward in the elective franchise. This makes it safe to place all the greatest burden of taxation on minority classes and persons; and this is just what is done every year. To minorities, the most solemn guarantees of our Constitution are rendered only the false flowers of promise. To minorities, the declaration of rights is only as the idle talk of children who say that they live in castles and in luxury, but go daily and nightly home to hovels and squalid poverty. To minorities, liberty and natural rights are only as false fruit, painted to lure the eye and tempt the appetite, but in the mouth are only ashes and disappointing bitterness.

It has been said that the prohibited right becomes a privilege, inasmuch as the prohibition operates as a guaranty to him who pays the price put upon it. Under the awkward philosophy that misery likes company, there might be found in this argument a grain of comfort.

So, if A. is robbed in a certain wood it is comforting to be assured that if B. comes that way he shall be also robbed. Let us weigh this proposition. A. is twenty-one years of age, and concludes to follow a certain trade or occupation, for which he has prepared himself. He selects Chattanooga, in Hamilton County, or Nashville, in Davidson County, Tennessee, as his place of business and his home. He asks no charter, no monopoly, no immunity, no privilege from the Legislature, but engages in something that every man has a right to engage in, independent of the Legislature. A law is passed prohibiting the exercise of that trade except upon payment of one hundred dollars. A. borrows that sum from a friend and takes out his license, which certifies that the money is paid and A. is authorized to do that particular business in such a place. He has his *guaranty* for a year now, and thinks, perhaps, that he is safe, and has a special warrant of success. But the County Court comes along and prohibits that business again, upon same terms. A. shows his license but is laughed to scorn. With difficulty he borrows again, and takes out license, putting his double "guaranty" very carefully away. The municipal authorities next wait upon him for a similar purpose. If he can borrow again, or if he has property, books, tools or implements of trade that can be sold, fifty dollars is again extorted from him. If we call it tax, and the rate be one per cent., he has been required to pay the full rate on a capital or property of twenty-five thousand dollars, and that as an advance upon nothing except his yet untried muscle, skill, brains, enterprise or industry. It may, perhaps, have proven to him a guaranty of debt and insolvency, but nothing better. Yet this—is "the law of the land!" This is equal and uniform taxation! This is "warranted by the Constitution of our State and the only corrective is in the elective franchise."

The rights of minorities are not only arbitrarily dealt with, but they are taken away with the most wanton cupidity. Our statutes, anticipating protests, flaunt the question in our faces, "What are you going to do about it?" The cause of the minorities who are oppressed, and the few who are impoverished by these laws, or acts of Assembly, should be espoused by every man in the State, for the principle is dangerous to all. It only requires a change in politics or in industrial interests to bring it home to those who now do not feel it, and who are at ease through relief wrung out of the oppression of their neighbors. Outspoken public opinion should

pronounce these acts what the courts should have done in the outset, "unconstitutional and void." Every lawyer should lift his eyes above the financial necessities of his State, and pronounce against these acts in accordance with those great principles of right and justice that govern all law. It is not enough to admit that they are hard and that they are unwise and that they unduly oppress a few. They touch the rights of these few with such violence that they are wholly incompatible with a free government. They do this by such processes as can not be justified by any course of reasoning, nor can they be reconciled with legal principles by any sophistry, nor by any words that man can invent.

The law is, that taxation shall be equal and uniform, and these acts make it different.

The law is, that excessive fines shall not be imposed, and these acts impose them without cause and without trial.

The law is, that every citizen shall be protected in the enjoyment of his personal liberty and his property. These acts deprive a minority of both.

The law declares that courts shall be open, and right and justice shall be administered without sale. These acts close the courts against those who are wronged by the acts themselves. They also put a price upon the seeking of any redress.

The law is, that a common burden shall be sustained by a common contribution. These acts lay the greater weight upon the minority.

It is a principle of law that in regulating a man's occupation so that in its exercise he shall not infringe upon the rights of another, the Legislature may not go so far as to take away the substance of the first man's right. These acts, without pretense of regulating, take away both the substance and shadow of rights.

These acts take away rights and privileges and give nothing. They take away security and give insecurity of person and property. They take away liberty and property and give only a receipt for money obtained by extortion and under false pretense of law. They are manifestly opposed to public policy. They are in violation of our Constitution, or else the latter is in violation of those principles of natural right and justice which precede Constitutions and give them force and authority. This proposition we are not prepared to admit as truth.

For the sake of an oppressed minority, whose rights are arbitra-

rily taken away; for the sake of common right and justice; for the sake of law and order; for the sake of free government, our courts ought to render these acts, in fact what they are in law, void. Our Legislature ought to repeal them.

J. S. WILTSE.

Chattanooga, Tennessee.

NOTE.—Since the publication of my first paper on Privilege Tax, I have received a brief in a case pending in the Supreme Court of Texas. S. T. Blissing *et al.*, Appellants, *v.* The City of Galveston, Appellee; L. E. Trezevant of counsel for Appellants. This case involves something of the same principle that our privilege tax involves. By a coincidence more interesting than surprising to me, Mr. Trezevant and I have gone to a considerable extent over the same grounds, quoting the same authorities. He has quoted many more than I could properly do in a short article for THE LAW REVIEW. I, however, have to thank Mr. T. for reference to the Arkansas case quoted above. I shall watch with interest the proceedings in the Supreme Court of Texas.

J. S. W.

*The Rule of Private International Law as to Sales made where Lawful, when the Goods sold are to be Removed for Resale where Unlawful.*

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"A." is domiciled in Missouri. "B." is domiciled in Massachusetts. In the former State, there is no statute prohibiting the sale of intoxicating liquors. Under the statutes of Massachusetts, the sale of such liquors, except for certain specified purposes, is unlawful. "A." is a wholesale dealer in liquors and sells to "B." a bill of his goods. "B." takes the goods to Massachusetts and resells them in violation of the laws of his State. "B." fails to pay "A." the price of the liquors, and "A." sues him in the courts of Massachusetts. Can the plaintiff recover? What is the remedy of the vendor in the forum of the vendee? Our subject invites us to the discussion of this question.

Tracing the history of our theme back to the earliest English case on the subject, we find that the doctrine upon which the English and American cases ultimately rest, was first definitely stated by Huberus. DeConfl. Leg., § 2. His rules, abridged from the profuse and barbarous Latin in which they are expressed, convey the meaning that "while the laws of a State are of paramount authority within its own limits, they can be of no binding force in a foreign State, excepting that State favor their effect, through comity, which indulgence, however, no State can be called upon to grant when its own ideas of policy will be violated in consequence thereof." This introduces us to the rule, that foreign laws are only to be admitted by a comity, which is to be defined by the courts of the admitting State. In order to arrive at a correct perception of what this definition should be, let us proceed step by step. A right is asserted in forum "X." by a foreigner, citizen of forum "Y." against a violation of the duty correlative to that right by a citizen of forum "X." The first thing to be considered is the time when the duty arose, and the territorial law to which, at that time, the party on whom the duty is imposed, was subject. Then the principle applies that rights which have once well accrued by the appropriate territorial law, by comity, are treated as valid everywhere. When, therefore, the rights of the vendor are once perfected under the laws of his domicil, they are in a condition to be asserted and

enforced in the forum of the foreign vendee. But the sale must have been completed by a delivery in the State of the vendor, for until a delivery to the vendee, the right of the vendor to enforce his remedy for the price in the forum of the vendee has not accrued. And if the vendor perfect the sale by a delivery in the State of the vendee, the contract will have been executed in a State where the execution is illegal, and will be *nudum pactum*. This brings us to the rule of Private International Law, that the legality of the thing promised to be done should depend upon the law of the place where it is to be performed. It is by this rule alone that the cases illustrating our subject can be explained. If the contract which is to be performed, or which has already been executed, is legal by the law of the place of performance, it is enforceable in any forum. But if the obligor has undertaken to perform a contract which is illegal under the laws of the place of performance, though lawful in the place of contract, his performance will debar him of all remedy against the foreign obligee domiciled in the place of performance. For, then, the obligor's right will not have accrued in his own State, where the contract would have been valid, but the contract will have been executed in a State where such contract is prohibited.

In the case of sales of goods, therefore, which are lawful at the place of sale, but unlawful at the place of resale, in order to entitle himself to a remedy in the forum of the vendee's domicile, the vendor must have desisted from all connection with the sale within the limits of his own State. This is the general rule, which we have been at some pains to extract from the English and American cases bearing upon our subject.

The decisions, however, almost universally mention one exception to this rule, and in this they have followed the rules of Huberus. No State can be justified in requiring its tribunals to enforce obligations which it holds to be founded in wrong or which are against its ideas of public policy, and this, although the obligor's right has already well-accrued under the laws of his domicile. There seems, however, to be no necessity for this rule, especially in regard to the class of cases we are now considering. For the individual decisions will be found to be of such a nature, that, when the sale has once been legally completed in the State of the seller, the argument of public policy as a defense to an action for the enforcement of the contract, has never been received with favor in the courts of the prohibiting State. Considerations of local policy will only be

regarded as good grounds of defense when they are of unquestionable pre-eminence.

Besides this seeming exception, the general rule has, as all such rules must have, its limitations in particular cases, which can not be better illustrated than by an examination of the cases themselves.

The decisions in which this question was first determined in England, arose from sales of goods made abroad and afterwards smuggled into England and sold in violation of the revenue laws. The leading case in the whole line of the adjudications is *Holman vs. Johnson*, Cowp., 341, decided in 1775, in the King's Bench. This was an action for tea sold at Dunkirk, in France, by two French partners to an Englishman, who smuggled the goods into England. Lord Mansfield held, that, though the Frenchman knew the goods were to be smuggled, the action would lie, because the sale was completed abroad by delivery, and the vendors had no concern in the smuggling scheme. The gist of the whole transaction turned on this: that the conclusive delivery was at Dunkirk. If the defendant had bespoke the tea at Dunkirk to be sent into England at a certain price, and the plaintiffs had undertaken to send it into England, or had any concern in the running of it into England, they would have been offenders against the laws of that country. But upon the facts of the case from the first to the last, they clearly had offended against no law of England.

The learned judge also advanced as a reason for his opinion, that no country ever takes notice of the revenue laws of another. This remark is *obiter*, for the learned judge himself states upon what point the gist of the whole transaction turned. The same may be said of the distinction mentioned in this case between a demand founded upon an immoral act, and one founded upon a violation of some positive act of Parliament, the old distinction between *malum in se* and *malum prohibitum*, which idea is now exploded: *Aubert vs. Maze*, 2 B. & P., 371 (1801); *Cannon vs. Bryce*, 3 B. & Ald., 179 (1819); *Terrett vs. Bartlett*, 21 Vt., 184 (1849). In the main, however, the case is well decided, and though often doubted, has never been shaken as an authority. Next came *Biggs et al. vs. Lawrence*, 3 T. R., 453 (1790). Plaintiffs were four partners, three of whom lived in England and the fourth in Guernsey. [Jersey, Guernsey, Sark and Alderney are governed by their own laws and customs; they are not bound by common Acts of Parliament, unless particularly named. 1 Black. Com., 106.] The partner in Guernsey sold and delivered brandy to defendant's agent in Guern-

sey, and packed it in a peculiar manner for smuggling in half ankers. Lord Kenyon held that this case differed from *Holman vs. Johnson*, which was cited for the defendant. For there the vendor had no concern in the smuggling; here he participated by packing the goods in a peculiar manner to escape detection. Besides, the plaintiff resident in Guernsey was considered to be the agent of the three partners resident in England, and as they, at least, were bound to take notice of the laws of the realm, they could not recover on a contract made in violation of an Act of Parliament. In *Clugas vs. Penaluna*, 4 T. R., 466 (1792), a Guernsey man brought an action for brandy sold and delivered to a resident of England. The former failed to recover, because he had assisted the buyer in smuggling the goods into England, as in *Biggs vs. Lawrence*. If the vendor's connection with the transaction had ended with the delivery in Guernsey, he would have recovered. *Bernard vs. Reed*, 1 Esp., 91 (1794), was similarly decided. In *Wamell vs. Reed*, 5 T. R., 598 (1794), plaintiff sold and delivered laces to defendant in France, and packed the goods in a particular manner to facilitate the smuggling. Lord Kenyon held that the vendor could not recover. And it was remarked by Buller, J., that the case did not rest on the fact of the plaintiff's knowledge of the buyer's illegal purpose, but upon the fact that the seller was an active participant in the smuggling transaction. The latest English case that we have on the question under discussion is *Pellicott vs. Angell*, 2 Cr. Mees & Rose, 311 (1835), in which the doctrine of *Holman vs. Johnson* is followed. It was held by Lord Abinger, C. B., that a foreigner selling and delivering goods abroad to a British subject, might recover the price, although he knew at the time of the sale and delivery that the buyer intended to smuggle them into England; that there was nothing illegal in merely knowing that the goods were to be resold in contravention of the laws of another country. The distinction is where the foreign vendor takes an actual part in the illegal adventure. The mere sale to a party, although he intends to commit an illegal act, is no breach of the law.

The foregoing cases are the only ones we have been able to find in the English books that bear exactly upon our question, and they suffice to establish the rule first announced by Lord Mansfield in *Holman vs. Johnson*.

We come now to the American decisions, which will be found to sustain and confirm the English rule with very few exceptions. Before entering upon a further examination of the cases, we wish

to call attention to the precise question which we are now discussing. Only those cases come strictly within the purview of our subject, which have arisen between vendor and vendee, who are foreigners to each other; and as it has often been decided in our courts, that a citizen of one State of the Union is, in law, to be regarded a foreigner as to a citizen of any other State, it will follow that a sale made by a citizen of New York, for instance, to a citizen of Massachusetts, when the sale is lawful in New York but unlawful in Massachusetts, will give rise to the precise legal question of which our subject proposes to treat. We make this limitation because many of the decisions in our courts have brought into the discussion of this question, cases both English and American, that arose between vendor and vendee who were citizens of the same State, and hence equally subject to the laws of that State. We fail to perceive what light the authority of such cases can throw upon a question that is purely one of private international law. There are cases which hold that where a sale is made in a State or country, of goods to be used in the same State in violation of its laws, the mere knowledge, and nothing more, of the purchaser's illegal purpose will preclude the seller from all remedy in the courts of his country, and this is the rule of the later English cases: *Cannon vs. Bryce*, 3 B. & Ald., 179 (1819); *Appleton vs. Campbell*, 2 C. & P., 347 (1826); *McKinnell vs. Robinson*, 3 M. & W., 434 (1838); *Ritchie vs. Smith*, 6 C. B., 462 (1848); *Pearce vs. Brooks*, L. R., 1 Exch., 214 (1866). But the authority of these cases does not extend to contracts made in a foreign State, where such contracts are lawful. Even this rule is very doubtful in this country; for in the Supreme Court of the United States, and in many of our State courts, the doctrine of *Holman vs. Johnson* is applied even to sales made between vendor and vendee, who are citizens of the same State: *Armstrong vs. Toler*, 11 Wheat., 258 (1826); *Steele vs. Curle*, 4 Dana, (Ky.), 381 (1836); *Cheney vs. Duke*, 10 G. & J., (Md.), 11, (1838); *Peck vs. Briggs*, 3 Den., 107 (1846); *Kreiss vs. Seligman*, 8 Barb., 439 (1850); *Harris vs. Runnels*, 12 How., 79 (1851); *Tracy vs. Talmage*, 14 N. Y., 162 (1856); *Michael vs. Bacon*, 49 Mo., 474 (1872).

The earliest case bearing upon our question in the United States is that of *Cambioso vs. Maffett*, 2 Wash., C. C., 98 (1807). Cambioso was a foreigner and, together with Maffett, a citizen of the United States, carried on a trade to this country in violation of the revenue laws. The goods shipped to this country were the joint

property of both parties, and were sold here by Maffett. Cambioso afterwards died, and his representatives brought suit here to recover Cambioso's share of the proceeds of the sales made by Maffett. Plaintiffs failed to recover.

The force of the doctrine of *Holman vs. Johnson* was admitted to the effect that a firm and final contract, made by a foreigner in his own or a foreign country, with a citizen of this country, would be valid here, though the obligee intended to violate our revenue laws, the obligor not being a participator in the intended fraud. But this rule could not apply to this case, from the fact that the sales had been completed in this country through Maffett, who could not be regarded otherwise than as the agent of Cambioso, standing as the principal in the unlawful transaction. This case is very similar to *Biggs vs. Lawrence*, 3 T. R., 453, before cited. It is the only revenue case that has ever in this country involved the question under discussion; yet there is no reason to doubt that should a case arise in the future, the rule of *Holman vs. Johnson* would govern in the Federal courts. Another class of cases illustrating our subject, comprises those in which lottery tickets were the subject-matter of the sale. In *Udall vs. Metcalf*, 5 N. H., 396 (1831), lottery tickets were sent by plaintiff, a citizen of Vermont, to defendant, for sale in New Hampshire. Counsel for plaintiff relied upon *Holman vs. Johnson*, but the court decided for defendant, on the ground that the latter acted as plaintiff's agent in selling the ticket in New Hampshire; that, hence, the sale had not been executed in Vermont, so as to bring the case within *Holman vs. Johnson*, but had been completed in New Hampshire, in direct violation of the statute in that case made and provided. In *Case vs. Riker*, 10 Vt., 482 (1838), the vendor of lottery tickets in Rhode Island, to defendant, a citizen of Vermont, recovered the price on the ground that the sale was legal in Rhode Island, where it had been executed, and this although the vendor knew that the buyer intended to resell the tickets, in violation of the laws of Vermont. Collamer, J., relied upon *Holman vs. Johnson*. The following cases were decided upon a similar state of facts and upon the same principle: *McIntyre vs. Parks*, 3 Metc. (Mass.), 207 (1841); *The Commonwealth of Kentucky vs. Bassford*, 6 Hill (N. Y.), 526 (1844); *Jameson vs. Gregory*, 4 Met. (Ky.), 363 (1863). In *McIntyre vs. Parks*, the proposal of purchase was made by letter, sent to plaintiff in New York, and there assented to by him. The contract of sale was held to have been executed in New York. In

*Kentucky vs. Bassford*, Nelson, C. J., decided the argument of public policy of no weight as a defense to an action for the price. In *Jameson vs. Gregory*, Duvall, C. J., followed *Holman vs. Johnson*, *Pellecott vs. Angell*, and *McIntyre vs. Parks*.

Next and last, we reach a very numerous class of decisions, and one that will best serve to illustrate every phase of our question. We allude to the cases of sales of intoxicating liquors, by a vendor, in a State where such sale is lawful, to a vendee, residing in a State where the resale of the goods purchased is prohibited by statute. It will be found, as we proceed, that the courts of the prohibiting States invariably construe their statutes as having no extra-territorial operation, holding that, when a sale of liquors is lawful, under the laws of the vendor's State, the sale is completed and executed by delivery to a carrier for transportation to the vendee, and that the vendor may in that case recover the price in the forum of the vendee's domicil. But where the sale is completed within the limits of the prohibiting State, or when the vendor enables the vendee to make an illegal resale of the goods, or is in any way a participator in the unlawful transaction, the former is precluded from all remedy in the forum of the latter. Mere knowledge, however, on the part of the seller of the illegal intent of the vendee, without an active participation in the unlawful adventure, will not debar the former of his remedy for the price of the goods sold.

Yet, when the statutes of the prohibiting State include, by express language, sales made in other States, as was the effect of the statutes of 1851 and 1858 of Maine, the statutes of 1855 of Massachusetts, and the general statutes of Connecticut and Iowa, the courts were, of course, bound by the legislative will. But even under these circumstances, the statutes are very liberally interpreted in the direction of upholding a contract once legally executed in a foreign State.

The Supreme Court of Vermont decided the earliest case upon a sale of this class: *Territt et al. vs. Bartlett*, 21 Vt., 184 (1849). Plaintiffs, who were the vendors, had their place of business in New York. One of them went to Vermont, took an order from defendant for certain liquors, and returned to New York, where he filled the order and forwarded the goods to defendant. Redfield, C. J., held that the contract of sale was executed in Vermont, and that, therefore, plaintiffs could not recover. *Backman vs. Wright*, 28 Vt., 187 (1855) and *Backman vs. Mussey*, 31 Vt., 547 (1859),

were decided upon a similar state of facts. In the latter cases, some of the sales were made upon orders taken by traveling agents in Vermont, and some upon orders sent direct to New York by defendants. It was again held, that the former sales were executed in Vermont, and that for these the price could not be recovered; but that the sales, which were made upon the orders sent to New York, having been there lawfully executed, would be upheld in Vermont, on the ground that the statute had no extra-territorial operation, and that mere knowledge on the part of the vendor as to the illegal resale was insufficient as a defense to an action for the price. The subsequent cases of *Barnard vs. Houghton*, 34 Vt., 264 (1861), and *Tuttle vs. Holland*, 43 Vt., 543 (1871), were decided in accordance with the same principles. In *Aiken vs. Blaisdell*, 41 Vt., 655 (1869), the vendor of New York failed to recover, because of participation in the illegal adventure, by having forwarded the liquors in a disguised form, thus following *Biggs vs. Laurence*, and *Clugas vs. Penaluna*, which cases we have already considered.

With all respect for the superior learning of the presiding Justice in *Territt vs. Bartlett*, and *Backman vs. Wright*, we think that the ruling in these and subsequent cases in Vermont, as to the point of agency, is at variance with principle and the weight of authority. For it is now well established, that when sales are effected through the agency of commercial travelers, or even by the principal vendor himself, although the price and quantity be specified at the time the order is taken in the State of the vendee, where the sale of the article is interdicted, the contract of sale will not be regarded as executed and binding until the order is filled at the domicil of the foreign vendor, by a selection and separation of the goods specified, and a delivery is made to a carrier for transportation to the vendee. If the sale is valid, where thus executed, it is valid everywhere. This is the current of the Massachusetts and New Hampshire cases: *Merchant vs. Chapman*, 4 Allen, 362 (1862); *Finch vs. Mansfield*, 97 Mass., 89 (1867); *Hill vs. Spear*, 50 N. H., 253 (1870); [see also *Sortwell vs. Hughes*, 1 Curtis, C. C., 245 (1852)]; and such was the judgment of the Supreme Court of New York in a case in which the sale of liquors was completed in New York by filling out an order taken by the vendor while in this very State of Vermont: *Backman vs. Jenks*, 55 Barb., 469 (1869). The contract of sale, when the order is taken in the vendee's State, is merely executory until it is executed by a compliance with the order on the part of the vendor in his own State. It is the same



rule that is applicable to insurances made through agents of foreign insurance companies. The contract is not completed until the officers of the company have assented in the State where the chief office of the company is located: *Hyde vs. Goodnou*, 3 N. Y., 266.

In New Hampshire the rule of *Holman vs. Johnson* has ever been followed, although lately a strong attempt was made to overthrow the authority of that decision: *Smith vs. Godfrey*, 28 N. H., 379 (1854); *Hill vs. Spear*, 50 N. H., 253 (1870).

In Maine the same rule governed in the case of *Torrey vs. Corliss*, 33 Me., 333 (1851). In 1851, just after the latter decision, an act was passed which extended the prohibitory law to liquors sold in any other State or country whatever, and under this statute the case of *Dearborn vs. Hoit*, 41 Me., 120 (1856), was decided. Plaintiff, the vendor of liquors in Massachusetts, was nonsuited in action to recover the price. The act of 1856, repealing the act of 1851, again introduced the doctrine of *Holman vs. Johnson*, which was followed in *Barnard vs. Field*, 46 Me., 526 (1859), when the vendor recovered the price, the sale having been executed in Massachusetts. But in *Banchor vs. Mansel*, 47 Me., 58 (1859), the seller of Boston, Mass., was nonsuited by reason of his aiding and participating in the illegal adventure of the purchaser. In *Wilson vs. Stratton*, 47 Me., 120 (1860), the sale by the foreign vendor was conditional, a contract of sale or return, the vendee having had the liberty of keeping or returning the goods as they suited him or not. The latter concluded to keep them, and since the assent was given in Maine, the contract of sale was there executed, and was, therefore, illegal. The actions in the last three cases were brought while the act of 1856 was in force. In 1858, however, a very stringent act was passed to the effect that if a person purchased intoxicating liquors out of the State, with the intention to sell any part thereof in violation of the act, the seller could not recover the price of the liquors in Maine, although he had no knowledge of the purchaser's intention. This law puts an end to all argument of the question under discussion, and the rule of *Holman vs. Johnson* had subsequently no application in Maine. For in the latest case, *Meservey vs. Gray*, 55 Me., 450 (1867), it was held, that the seller in another State, in order to recover, must ascertain at his peril that the purchaser of Maine does not intend to resell in violation of the act.

In Massachusetts the cases are even more fluctuating than in Maine, and for the same reason. The statutes on the subject were often changed. Yet it will be found that, when the statutes are

not intended by express language to have an extra-territorial operation, the rule of *Holman vs. Johnson* is implicitly followed. The earliest act, that of 1852, did not, in express terms, apply to sales made in other States, and in the first case, *Orcutt vs. Nelson*, 1 Gray, 536 (1854), in which our question was brought up in the Supreme Judicial Court, Shaw, C. J., was of opinion that there could be no legal inference that the act was to be extended to such a sale; that the sale was complete when the plaintiff had delivered the goods on board the cars in Connecticut, to be forwarded to the defendant. Next came the case of *Dater vs. Earl*, 3 Gray, 482 (1855), which presents a state of facts similar to those in *Holman vs. Johnson*, and upon the authority of that case it was held by Merrick, J., that a sale of liquors, completed and valid in another State, the seller knowing but not participating in the intent of the purchaser to resell them in violation of the laws of Massachusetts, would support an action for the price in the latter State.

The two preceding cases were decided under the common law, and in the following decision, *Webster vs. Munger*, 8 Gray, 584 (1857), Thomas, J., started by saying that this case was also to be decided by the common law, since the action having been brought before the statute of 1855, was not to be effected by that act nor by that of 1852, it having been expressly decided in *Orcutt vs. Nelson*, that the latter statute had no extra-territorial operation. The main facts in *Webster vs. Munger* were these: Plaintiff, who was a resident of Springfield, Massachusetts, where he had formerly carried on a liquor business, had, before the time of this action, closed up his business in Springfield, and started a like business at Hartford, Connecticut. He continued, however, to reside at Springfield, paying almost daily visits to Hartford. In the course of his business in the latter place, plaintiff received orders for liquors from defendant, who kept a tavern at Palmer, Massachusetts. These orders were filled and the goods forwarded by a common carrier from Hartford. Under instructions from the court below, the jury found for defendant, and exceptions taken by plaintiff to the action of the court were overruled, and the judgment on the verdict sustained by the Supreme Judicial Court. Now, in view of the cases previously decided by the same court, and upon principle, we are led to think, not only that the instructions upon which the verdict of the jury was founded were faulty, but that the reasoning of the learned Judge in the court of last resort, in support of the instructions, was erroneous. For one of the instructions was to the

effect, that, although the sale by plaintiff to defendant was completed at Hartford, Connecticut, nevertheless a knowledge on the part of the plaintiff that the liquors were to be unlawfully resold in Massachusetts, should preclude the vendor from recovering the price. We have already seen that, under the rule of private international law, mere knowledge on the part of the vendor of the illegal purpose of the vendee, without the participation of the former in the illegal adventure, is not regarded as sufficient to defeat an action for the price brought by the foreign vendor in the forum of the vendee's domicil. Viewed in this light, the instruction in question was erroneous, and as the jury might have found in accordance with it, we think that the judgment on the verdict should have been reversed. The learned Judge in reviewing the instructions, supports them on the authority of *Lightfoot vs. Tenant*, 1 Bos. and Pul., 551 (1796), and of *Langton vs. Hughes*, 1 M. and S., 593 (1813). But neither of these cases involved a single question of private international law. The plaintiffs and defendants in both were permanently domiciled Englishmen, and had in England entered into contracts in direct violation of British statutes. These cases can, therefore, have no bearing upon the present one. The learned judge then proceeds to discuss the cases of *Holman vs. Johnson*, and *McIntyre vs. Parks*, 3 Mete. 207, and denies their authority, when they are exactly in point. Besides this, no notice whatever is taken of *Dater vs. Earl*, decided just previously upon the very point in controversy.

The fact that plaintiff resided in Springfield, Massachusetts, does not alter the case. Where was his business domicil? Where was the contract of sale executed? Clearly at Hartford, by the delivery of the goods to the carrier to be forwarded to the defendant at his risk. And so, the contract having been completed at Hartford, and being valid under the laws of Connecticut, should have been upheld in Massachusetts in the light of *Orcutt vs. Nelson*, *McIntyre vs. Parks*, and *Dater vs. Earl*. *Webster vs. Munger*, therefore, stands alone, and is neither decided in accordance with previous cases, nor followed, as we shall see, by the later ones.

In 1855, there was enacted a statute which made a considerable change in the rule of the common law, as to the nature and sufficiency of the evidence requisite to defeat an action of the foreign vendor for the price. This act prescribes that "no action of any kind shall be had or maintained in any court for the price of any liquors sold in another State for the purpose of being brought into this commonwealth to be here kept or sold in violation of law,

under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained such illegal purpose:" Mass. Gen. Stat., 1860, ch. 86, § 61. Notwithstanding this statute, the courts were loth to depart from the common law rule, and the act was liberally construed in favor of vendors in other States, when it was plain that the vendor had no concern in the illegal transaction. In *Hubbell vs. Flint*, 13 Gray, 277 (1859), the sale was made in New York, and the vendor failed to recover the price on the ground that he had intentionally aided, assisted and co-operated in the unlawful purpose of the vendee. This would have been the decision at common law independently of the statute. In *Kellogg vs. Moore*, 2 Allen, 266 (1861), the sale had also been made in New York, and the seller recovered on the ground that the sale was lawful where made, that the vendor was not bound to know the laws of Massachusetts, and that there was no evidence to show that plaintiff had reasonable cause to believe that the goods were bought to be illegally resold in Massachusetts.

We come next to the very strong case of *Merchant vs. Chapman*, 4 Allen, 362 (1862). It is somewhat remarkable that in this case Judge Metcalf sustains the doctrine of *Holman vs. Johnson*, while in his able work on contracts he sees fit to doubt the rule as there laid down: Metcalf on Contracts, pp. 260-270. The vendors of New York recovered on the ground that there was no evidence to show that they had reasonable cause to believe that the liquors were to be illegally resold by the purchaser; and this although the sales were effected through orders taken by a resident agent of plaintiffs in Massachusetts. The sale was not regarded as complete until the orders had been filled in New York, and the goods delivered to a carrier for transportation to defendant. In *Savage vs. Mallory*, 4 Allen, 492 (1862), the statute of 1855 was very strictly construed in favor of the vendor, and a verdict and judgment for defendant reversed for an error in the instructions, Chapman, J., holding that in order to defeat the action of the foreign vendor it is not enough for the jury to find that the vendor believed, or had reasonable cause to believe, that the purchaser had the illegal intent, for, in that case, the vendor might be mistaken in his belief; but that the jury must find that the vendor had knowledge that the purchaser entertained the illegal purpose. Such findings would imply the existence of the purpose; but the fact that the vendor had reasonable cause to believe it, does not imply its existence. Under instructions framed in accordance with this opinion, the following cases

were decided in favor of the defendant vendees: *Bligh vs. James*, 6 Allen, 571 (1863); *Crary vs. Pollard*, 14 Allen, 284 (1867); and *Charlton vs. Donnell*, 100 Mass., 229 (1868). In *Finch vs. Mansfield*, 97 Mass., 89 (1867), which was a case of sale in Connecticut, the vendor recovered on the ground that their traveling agent, who took the order for the liquors in Massachusetts, did not know at the time that the "Maine law" was in force there, and that such knowledge could not be presumed from the fact that he was at some indefinite time prior to the taking of the order, informed that there was a "Maine law" in force there. In *Abberger vs. Marrin*, 102 Mass., 70 (1869), plaintiff was the vendee, who brought an action to recover money paid to defendant, a citizen of New York, for intoxicating liquors. Judgment went for defendant. The sale was in this case adjudged to have been executed in New York, although the vendor had personally taken the order in Massachusetts, thus following *Merchant vs. Chapman*.

It is evident from these cases that the courts manifested a strong leaning towards the common law rule in spite of the rigor of the statute of 1855.

The latter act was repealed by the statute of 1858, c. 141, § 26, and the rule of *Holman vs. Johnson*, and *Dater vs. Earl*, was for a time re-established, as will be seen by the cases of *Adams vs. Coulard*, 102 Mass., 167 (1869); *Ely vs. Webster*, *Ib.*, 304; *Tracy vs. Webster*, *Ib.*, 307; *Brockway vs. Maloney*, *Ib.*, and *Hotchkiss vs. Finan*, 105 Mass., 86 (1870). The statute of 1869, c. 415, § 63, however, re-enacted the statute of 1855, and will, consequently, govern as to future sales.

In the United States Circuit Court for the First Circuit, the rule of *Holman vs. Johnson* has always prevailed: *Sortwell vs. Hughes*, 1 Curtis C. C., 245 (1852); *Green vs. Collins*, C. C. of U. S. for Mass. District, October Term, 1870, opinion per Clifford, J. This is also the rule in Rhode Island, *Read vs. Taft*, 3 R. I., 175 (1855), where it was decided that the prohibitory statute in Rhode Island could have no extra-territorial operation, that a sale of liquors completed and valid in New York would be upheld, and that the vendor could recover the price.

In Connecticut, the statute allows no action for the price of liquors sold in any other State with the intent to enable the purchaser to violate the laws of Connecticut. In *Reynolds vs. Geary*, 26 Conn., 179 (1857), the illegal intent of the vendor was proven, and the court properly held that under such a state of facts, the seller of New York could not have maintained his action for the price at common law.

In Iowa, the prohibitory statute is precisely like that of Connecticut, and in *Davis vs. Bronson*, 6 Iowa, 410 (1858), its construction was the same as that laid down in *Reynolds vs. Geary*. But in *Dalter vs. Lane*, 13 Iowa, 588 (1862), it was not proven that the vendors at St. Louis, Missouri, sold with the intent to enable the purchaser to resell in Iowa, contrary to the statute. The sale was, therefore, held as valid, and the vendors were confirmed in the possession of property which they had taken from the vendees as collateral security for the price of the liquors sold. *Whitlock vs. Workman*, 15 Iowa, 351 (1863), was a like decision upon a sale made in New York.

This closes our review of the cases that have actually been decided upon our question. There is another class of sales between citizens of different States, which is often mentioned by judicial writers, and in some of the cases. We refer to the sale of articles, the use of which is so plainly against the principles of morality and public policy of every civilized community, that the mere knowledge or acquiescence of the seller in regard to the illegal use of such goods by the purchaser, will constitute a defense in an action for the price. Such are sales of poison or weapons for purposes of self-destruction or murder, and sales of property to be used in treasonable enterprises. These exceptionable cases may doubtless arise, but they do not affect the general rule, as it was first announced by Lord Mansfield, in *Holman vs. Johnson*. And this rule applies to such cases as may constantly arise; for they include only those in which the sale is valid in the State of the vendor, but invalid under some revenue law, or some regulation of internal police, or as against some other idea of public policy, which the legislative body of the State has seen fit to express in its public laws. But because these regulations and laws may widely differ in different States, dependent as they are upon the peculiar ideas of the legislative mind, the courts of the prohibiting States have not seen fit to refuse the enforcement of contracts of sale that were lawfully executed in the State of the vendor. For, the liberal and enlightened judges of the land have never regarded the argument of the public policy of their respective States as a defense to an action for the fulfillment of an obligation lawfully contracted in a State whose ideas of public policy might justly have differed from those of their own States. Besides, it would be highly impolitic and subversive of the true interests of commerce, that a vendor should be called upon to inquire into the future and uncertain purposes of the buyer as to the use he intended to make of goods which at the time and place

of sale by the vendor are proper and ordinary subjects of mercantile trade. "The objection that a contract is immoral or illegal as between plaintiff and defendant," said Lord Mansfield, in *Holman vs. Johnson*, "sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice, as between him and the plaintiff, by accident, if I may say." We have already seen that this objection was not allowed in the leading case upon our question, nor was it allowed to prevail in any of the succeeding cases in England or America. In *Richardson vs. Mellish*, 2 Bing., 242 (1824), Burroughs, J., joined in the protest of Mr. Chief Justice Best, "against arguing too strongly upon public policy; it is a very unruly horse, and when you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never urged at all but when other points fail." Lord Campbell was of a like opinion, in *Hilton vs. Eckersley*, 6 E. & B., 47 (1855).

We conclude, therefore, that as a result of the cases actually decided, the general rule may be stated as follows: Where the sale is completely executed in the State of the vendor and is there lawful, the sale will be upheld in the courts of the vendee's State, and the vendor may there recover the price, although the resale is there unlawful, and the vendor knows, or has reasonable cause to believe, such resale to be unlawful. And this, notwithstanding, that the sale may have been brought about through correspondence, or by orders taken by the vendor himself, or his agent, from the vendee in the prohibiting State. But the vendor's connection with the transaction must have ceased in his own State, either by delivery to the vendee himself, or to his agent, as a common carrier, for transportation. If, however, the contract of sale is executed in the State of the vendee, by delivery there, either by the vendor himself, or his agent, as a common carrier, to whom the vendor pays the freight on his account, or if the vendor is, in any way, interested in the illegal design of the vendee, and is connected by contract in deriving profit from the unlawful resale by the vendee, or enables the latter, by participation, to effect his illegal purpose, whether by sending the goods in a disguised form, or by giving the carrier particular directions so as to conceal their mode of transportation, the vendor will be debarred of all remedy for the price of the goods, or the enforcement of the contract of sale in the courts of the prohibiting State.

## *Private Communications to Judges.*

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We are taught to pray "lead us not into temptation." We are also enjoined to avoid even the appearance of evil. This sacred rule our Judges, when upon the bench, apply to the conduct of human affairs, and hold him to a strict account who has laid himself open to suspicion, and require him against whom a presumptive case is made, to explain his conduct so as to show his innocence. And justly and wisely do they so. But all true rules work both ways, and apply, in principle, as well to the Judge as to him to be judged.

The recent impeachment and trial of the Judges in New York will, we trust, suggest a lesson as well to some who sit upon the bench, with consciences void of offense, as to some who practice before them, if with honesty, then with greater zeal than propriety. It is the old lesson to avoid alike temptation and the appearance of evil.

We do not now write of the consciously corrupt, nor indeed of individuals, whether pure or corrupt, but rather of a habit—a dangerous and, we fear, a growing habit—of some, both upon the bench and at the bar—that of knowing of and discussing causes out of court.

Whenever the common law prevails, certain rules of procedure have been adopted, not by caprice, but as the most logical and the safest method of investigating a cause. It is not claimed that truth is always reached by these rules; that would be to pronounce them infallible. It is true that the innocent sometimes suffer—the guilty often escape. It is true that the righteous cause is sometimes lost, and the unjust prevails, and yet no rule of law violated. The Judge who has heard many causes must sometimes have had his soul sore vexed at the short-handedness of the law. But others have sat upon the Bench before the Judge of the present day; many wise men, learned in the law, have sat there, and many good. Peradventure they, too, have sometimes wished to know more of a case than that developed before them. Sometimes, may be, they, too, have wished they could do more exact justice than the law; and yet the law we live under has come down enlightened, doubtless, by

their wisdom and tempered with their justice, but handed down to us by them as the safe rule of our conduct.

A cause is brought before a court, and the pleadings are read. The party seeking redress has given his statement of his case—has told the wrong of which he complains, and has asked the remedy he seeks. The other side has answered, giving his version of the matter, and stating his defense, to which the party seeking redress has replied. Then the evidence has been heard. The plaintiff has produced the evidence he thought necessary to maintain his cause, and the defendant has met it with such as he relies upon, which the plaintiff has again been allowed to meet and explain. Then the argument has been heard, the plaintiff's counsel presenting to the court his client's case as developed in the pleadings and evidence, and citing to it the decisions and rulings in similar or analogous cases found in the books. The defendant's counsel has then explained the case, as he and his client see it, and the plaintiff has again been allowed to reply, restricting himself to comments upon what has gone before, pleading, evidence and argument. But what avails it all, if, after the solemn trial in open court, the pleadings, the examination of witnesses, watched during its progress with jealousy by counsel on either side, the arguments, opening defense and reply, the Judge takes private advisement, and that of a party to the cause?

Unconscious of evil though he may be, the Judge who permits himself to be approached at all, except from the Bar, is likely to be approached when he is the *least aware of it*. "Lead us not into temptation," and he may add, *let me not tempt others*.

It is stated of an eminent American jurist, that having heard an application for an injunction, and reserving his decision for a longer period than the parties to the cause deemed to their interest, one of the counsel, an able and estimable lawyer, was induced, by the importunity of his client, to approach his Honor and to ask "*when* he would deliver his opinion?" "*When, sir, do you ask?*" replied the Judge. "Next you would ask *how*, and *that*, sir, would not be far from a contempt." The rebuke was merited. To question a Judge as to *when? how? or what?* about a case before him is a contempt—that kind of contempt which Lord Hardwicke defined as "*scandalizing the Court itself.*" 2 Atk., 471.

We all know the anecdotes which are told of Sir Matthew Hale, and have enjoyed the rebuff which the gentleman of the west county administered when the Judge insisted upon paying for the

venison sent him in the ordinary and formal etiquette of the times by one who happened, in that instance, to have had a cause before him. "From the needless fear of selling justice your Lordship delays it. I withdraw my record." But Sir Matthew, for the time he lived in, erred, if at all, upon the right side, "for the gift blindeth the wise and perverteth the words of the righteous." Is it not better, in our time, that honest judges should incline to the same? Better to have insisted upon paying for the venison before he heard the cause of the giver, than like Sir Thomas More, honest as he is now believed to have been, to have drunk even his own wine from the proffered cup before he restored it.

A few years ago Lord Chancellor Cottenham had occasion to express himself very earnestly upon the subject of private communications to a Judge.<sup>1</sup> In 1843 Mr. D. O. Dyce Sombre was found lunatic, and his wife and another person appointed committees of his person. Between 1843 and 1849, several applications had been made to the Lord Chancellor to obtain a *supersedeas* of the commission, and upon these applications the alleged lunatic had undergone various examinations, but the result had been uniformly unfavorable to the proof of the recovery sought to be established. The case came again before the Lord Chancellor in January, 1849, and was a very interesting one, but we have only now to refer to that part bearing upon the matter under consideration. Lord Cottenham, in delivering his opinion, observed that the circumstances under which the case came before him might have raised much difficulty as to the course he ought to pursue; that he owed a most important duty towards the court over which he presided, in which all those who were under the necessity of resorting to it were interested, and after noticing previous petitions and orders in the case, especially one upon a report made to him December 22, 1848, goes on to make the observations to which we wish now to call the attention of the profession whether on the bench or at the bar. Commenting on the report just alluded to, his Lordship observed that the correctness of the report was not then disputed, and goes on to remark:

"Not long after this I received two communications of a character *unexampled*, I hope, in the history of this court, the first dated the 24th December, 1848, two days after Mr. Dyce Sombre's petition for a *supersedeas* had been refused with the concurrence of his counsel.

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<sup>1</sup> In the matter of Dyce Sombre, 1 Mac'n. and Gird, 116.

signed by Dr. Parris, Dr. Mayo, Dr. Morrison, Dr. Copland and Dr. Costello. The other, dated the 18th of January, 1849, and signed by Lords ———, and four other gentlemen, and to which was added a note by Sir O. T. This latter document appears to have been intended, principally, to introduce the former. There are, however, parts of it upon which I shall presently make some observations. The whole proceeding was most irregular and improper. *Every private communication to a Judge for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought more frequently than it is to be treated as what it really is, a high contempt of court.* It is too often excused on account of the station in life of the parties, and their supposed ignorance of what is due to a court of justice. No such excuse can be made in the present instance. If this was not intended as a private communication, why has it been made in that form? Why was it not brought before the court in the usual manner, through the solicitor and counsel of the party who alone can be recognized as representing him? I have received from two of the subscribers to that letter, Lord ———, and Lord ———, assurances that nothing disrespectful to myself was intended by that communication. I never considered it in that light, but as a Judge of the court, against which the contempt has been committed, I am bound to express my high reprobation of the course pursued."

Thanks are due to the Lord Chancellor for thus exposing and holding up to the reprobation of the public the conduct of the persons of high rank, who, in their anxiety to serve the cause of a person whom they deemed oppressed, forgot the respect due to a court. That no disrespect was intended personally to the high official whom they thus approached, was no excuse. The contempt was in violating the dignity of the court over which he presided.

A still more recent instance of the scrupulous care with which the courts of England guard against any approach, except from the bar, and in open court, occurred in the first Tichborne trial (*Tichborne vs. Lushington*); the most remarkable case, perhaps, in the history of English jurisprudence.

It will be recollected that Sergeant Ballantine, in opening the case, had stated that before "Sir Roger," as he termed the "claimant," had left England, he had put into the hands of a Mr. Gosford a sealed package, telling Mr. Gosford that it contained certain directions to be followed in the event of his death, that the contents of that package were known to no human being but him-

self, the claimant, that it was in the power of the defense to produce the package, that, as the court would see, it would not be produced, but that the "claimant" would undertake to tell the contents.

The "claimant," in the examination, had not come directly and squarely up to the statement of his counsel, avoided the challenge to fulfil Sergeant Ballantine's promises, but in the cross-examination had sworn that the package contained a document or documents, whether one or more he was uncertain, providing for his cousin in case she should prove *enciente*, he having, *he swore*, seduced her, naming time and place.

The case had progressed very slowly, and little had been done when an adjournment was proposed for the convenience of court and counsel. But at what a sacrifice to the pure wife who, with her husband, had been sitting in the crowded court while this gross charge had been publicly made against her? No rest nor peace could there be for that family during the long vacation which the court and counsel desired to enjoy. But more than this, the mother, whose testimony alone could vindicate the purity of the unhappy lady, was an aged person, whose term of life was short, at most; would probably be the sooner ended by the distress of the vulgar notoriety in which the imposter had involved her daughter's honor. Surely she might plead with the Chief Justice of the country, not to allow her to go down to the grave without an opportunity to testify to her daughter's purity.

Under these circumstances Lady Doughty, the mother of Mrs. Radcliffe, the injured lady, wrote to the Chief Justice, imploring his Lordship to take into consideration her advanced age and her failing health, so increased by the intense suffering caused by the cruel charges brought against her only child, and praying him not to oppose the efforts that the Tichborne and Arundel families were making to prevent delay in the hearing of the cause.

But not even under these circumstances would the Court allow itself to be privately approached with impunity. Availing himself of a delay in the proceedings on the thirty-fifth day of the trial, the Chief Justice thus alluded to the subject:

"I have received a letter to which it is necessary I should call the attention of counsel on both sides. It purports to be written by a lady materially interested in this cause, and it was sent to me at my private address, I presume without the knowledge of counsel on either side. The circumstances under which the lady has written to me might, in consequence of the peculiar position in which she is

placed, excuse her addressing me on the subject, and of course if the letter had been confined to matters with which she individually had to deal, I should have simply handed the letter to the opposite party and the counsel on both sides. But unfortunately it professes to be written, as you will see in a moment, not only on behalf of the lady herself, but on behalf of some of the parties to the cause. *Now if they have made use of this lady for the purpose of making a representation on their behalf, nothing could be more reprehensible, because it is a direct communication from some parties to the cause to the Judge, not through their counsel, or legal advisers, but through a witness.* Having made that observation I will now hand the letter to the Solicitor General and to Brother Ballantine. You will see from whom it comes. Be kind enough to ascertain whether it is a letter of the lady from whom it purports to come, and whether parties to the cause authorized her to write it and send it to me. You will also be good enough to say whether it was written with or without the knowledge, or sanction, of the counsel and legal advisers on both sides."

The letter was then handed to the Solicitor General, who represented the Tichborne family, and to Sergeant Ballantine, and the latter, after reading it, observed that the letter had been written by a lady of advanced age, and as far as he was concerned, he could fully excuse her anxiety. To this the Chief Justice said:

"So far as the lady herself is concerned, we should all be agreed that the writing of the letter was excusable, but the serious part of the matter lies in the statement that *she had been deputed by the parties to the cause to make a representation.* If they have done so it is a most improper and reprehensible proceeding."

And again:

"As I have already said, the most serious part of the letter is that, according to her statement, *she has been deputed by the defendants in the cause to write to me, instead of making an application to me in open court and through counsel.*"

The Solicitor General, with his Lordship's consent, then read the letter, and added:

"I must say that this has reached my ears and knowledge for the first time. *I might almost venture to complain that your Lordship should suppose otherwise.*"

The Chief Justice assured him that he had not supposed so, but that it was necessary to ask the question. But Sergeant Ballantine was not content with this, and required that Sir John Coleridge should be instructed by his solicitors to say that *they* knew nothing

of it, when Mr. Dobinson, one of them, on their part, likewise disclaimed all knowledge of the letter.

The Chief Justice, after some further remarks, in which he complained "it appeared as if some influence of a private kind were used in other quarters," declined to alter the arrangement which Lady Doughty has thus earnestly, if unadvisedly, appealed to him to set aside.<sup>1</sup>

We have quoted the decision at some length as illustrating the opinion of the profession in England in regard to private communications to a Judge.

The Solicitor General complained that the Chief Justice should suppose that Lady Doughty's communication had been made with his knowledge, while the claimant's counsel presses him to say that he was instructed by his solicitors that *they* knew nothing of it. Throughout the decision, both Bench and Bar recognize as dishonorable any attempt privately to influence a Judge, the Bench resenting, and some of the Bar endeavoring only to excuse, under the circumstances of the case, the irregular remonstrances of one so deeply affected by the action of the Court.

The judges in England we see in these recent cases repelling, as of old, informal approaches to them, though made by the best in the land. Many of our courts, especially in the older States, are equally jealous of that dignity, as well as purity, nor do we mean to imply that our courts are generally open to improper approaches. But it is nevertheless true that there is great danger in this respect in the increasing disregard of formality in our proceedings.

Technical forms and ceremonies are said to be obsolete. We set aside the settled forms of pleading because they require an apprenticeship, such as the saw and the hammer, or the tongs and the anvil, and then we abolish the rules of practice as to obstructions to the approaches of justice.<sup>2</sup> We seek to allow every one to come to

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<sup>1</sup> NOTE.—A somewhat similar instance is mentioned by Hon. W. F. Cooper, in one of his very interesting articles (No. 3), upon English and French Law, in this REVIEW, vol. 2, page 445, in which the Chief Justice (Q. B.) Cockburn reproved a young German who had written his Lordship a letter apparently to hasten his cause.

<sup>2</sup> Is there anything whereof it may be said, See! this is new? it hath been already of old time which was before us. As we complain so did the philosopher of old. "It is a marvelous thing," says Socrates, "that when men desire to learn the art of playing on musical instruments, or how to manage horses, or to become skilled in any other such accomplishment, they do not seek to attain their object by continual efforts, without any instruction whatsoever, but they follow the directions, and perform the tasks, dictated by the judgment of all who have already acquired the mastery of such arts. But when they wish to plead, or to direct the affairs of State, then they imagine that, without any prior preparation or study, they are quite fit and capable of so doing: *Zen. Mem.*, Liber iv., chap. 2, § 6.

the judge with his own story in his own way, then he chooses his own time and place, and justice sits no longer *blind* in open court, but to use an expression which has risen with the occasion for it, "sees" in chambers.

Let us raise high the bench upon which our judges sit, and strengthen the bar which separates them from the advocates, that the public may hear and see all that is said and done in the administration of justice. Let our judges and counsel bear in mind that a private approach to a judge is seldom less than a contempt of court, and rarely otherwise than discreditable to the counsel who makes it. Let our judges, regarding with suspicion even the mention of a cause *out* of court, resent, as their brethren to whom we have alluded have done, any such approach, and our counsel, jealous of their honor, shun occasion for the vindication even of their uprightness. And bench and bar observing the mutual ceremonious respect so necessary in maintaining the dignity and purity of our courts will continue to enjoy the honor accorded to no other branch of our government.

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## **"THE PEOPLE."**

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**"ALL POLITICAL POWER IS INHERENT IN AND DERIVED FROM THE PEOPLE. ALL JUST GOVERNMENTS ARE FOUNDED ON THEIR AUTHORITY AND INSTITUTED FOR THEIR BENEFIT, AND PUBLIC OFFICERS AND MAGISTRATES ARE THEIR SERVANTS AND AGENTS. THE PEOPLE, THEREFORE, HAVE AT ALL TIMES AN INALIENABLE AND INDEFEASIBLE RIGHT TO INSTITUTE, ALTER OR REFORM THEIR GOVERNMENTS IN SUCH MANNER AS SHALL SEEM TO THEM PROPER."**—*Constitutions of the States.*

It is not here proposed to re-argue the broad question of the nature of our political system, but simply to clear away some of the cobwebs which political spiders have spun and woven around the sovereignty of "the people;" in other words, to ascertain the plain legal meaning of our fundamental political axiom that "the people" are sovereign, and to point out the necessity of adhering to it strictly in all attempts at constitutional interpretation.

Presuming that the members of the profession are not wholly ignorant of our political history, and prefer a statement which they can readily prove to be true to one which they can as readily prove to be false, we may venture to rest upon the truth of the following propositions:

At the time of the revolt of the British colonies and of the opening of their history as the original thirteen States of the Union, there appeared in each a separate, independent and self-constituted body of electors, at whose sovereign will and pleasure the powers of their State and State government were subsequently held and exercised; and not only the original Articles of Confederation, but also the present Constitution of the Union, derived authority and obligation from no other ultimate source or sources than the several, independent and sovereign sanctions given and pronounced by those several, independent and sovereign bodies of electors. By the side of these original bodies of electors a greater number of others have since grown up and have assumed and enjoyed a perfect equality with the original bodies. Thus now, as at first and at all times in our history, the several bodies of electors are not only "the people," and the only people known to our political system, but they are also the several political States, and the only States

known to our Constitutions as the United States of America. The expression, "We, the people," in a State constitution, refers to the body of electors by whose sole action it was ordained and established; and the broader expression, "We, the people of the United States," in the Federal Constitution, in like manner, originally meant the several bodies of electors by whose several ordinances of ratification that Constitution was ordained and established, and now means the several bodies of electors from whose several, independent and sovereign sanctions it now derives its only authority, significance and importance. Nowhere can be found in our history a single instance of an authorized act, either on the part of a delegate, representative, magistrate, or other public official, State or Federal, where the authority for such act had not its ultimate source in the sovereign power and independent action of some one or more of the several bodies of electors composing the several States.

It can hardly be necessary to notice the suggestion which has often been made, that the several original bodies of electors derived their several sovereign powers from the common consent of the whole American people as composing a single political body. That consent is like the consent of the people of Europe to the governments established by their kingly rulers. It was never asked for, and is nowhere evidenced.

Is it imagined that the source of the political rights, enjoyed by each of those bodies, may be traced to the Revolutionary Congress? The truth is, that the several original electoral bodies, each as a privileged body wholly independent of the others and subject only to the British Crown, existed from the times of the earliest settlements down to the period of the Revolution; that the first political act of the Revolution was the separate and independent assumption of political sovereignty by each of those bodies as a self-constituted and self-incorporated political community or State; and that every member of the Revolutionary Congress held his appointment and commission as a deputy, delegate or representative of some one of those bodies in particular and not as a deputy, delegate or representative of the people of America in general. It might be argued that the assumption of sovereignty by each of those several bodies of electors, was nothing more in the last analysis than mere usurpation. The political power in every country, and under all forms of government alike, originally arises from nothing but usurpations by one, or by many, upon what are called the natural rights of man; and

thence there necessarily exists a constant warfare, bloody or bloodless, between the rulers and the ruled, the former constantly striving to secure themselves in their usurpations, and the latter always demanding an enlargement of their rights and liberties. It is absurd to talk of government originally inaugurated upon the common consent of all the people subject to its operations. And it is perfectly clear that the only security any government can have against rebellions and forcible revolutions, or that any people can have against oppression and tyranny, is in some such peaceable method of political revolution as is (imperfectly) provided and secured by our Constitutions.

No way is hence open by which to trace the sovereignty of each several body of electors to a source beyond themselves, unless we adopt the course of some with respect to the eminent domain, and trace it to concessions or grants by the British Crown. Pursuing that course, however, a grateful remembrance of George III. should arise in our breasts for his graceful acknowledgment of the sovereignty and independence of each of those bodies by the treaty of peace. Indeed, to deny that each of the original bodies of electors existed, and continued to exist, from the moment of throwing off their allegiance to the British Crown, as a self-constituted and self-incorporated body, possessed of sovereign power, that is, as a sovereign community or State, is not only to break from the bonds of truth and good faith, but also to deny the validity of each and of all our Constitutions of government. But if any one of those political communities is sovereign every other in the Union is also sovereign. No one denies the equality of the States as political bodies. A voluntary Union of republican States was never possible upon any other principle, or in any other way, than by the separate and independent exercise of sovereignty by each of such States. And the very existence of such a Union involves the existence of just such States.

It is unnecessary to refer to the earlier decisions of the Supreme Court of the United States in which the sovereignty of "the people" was recognized as identical with the sovereignty of the States. For, notwithstanding all that was said and written in support and defense of the (not unnatural) tendency of things towards centralization during the late war, the language of that court is in perfect accord with the sovereignty of "the people" as political communities of free citizens or electors. "A State," says that court, "in the ordinary sense of the (Federal) Constitu-

tion, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written Constitution, and established by the consent of the governed. It is the union of such States, under a common Constitution, which forms the distinct and greater political unit which that Constitution designates as the United States, and makes of the people and States which compose it, one people and one country." (*Texas vs. White*, 7 Wallace's Rep., 721.) In the same case, that court declares, "that the preservation of the States and the maintenance of their governments are as much within the design and care of the (Federal) Constitution as the preservation of the Union and the maintenance of the national government; and that that Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." (*Ibid.*, 725.) The States, then, are "political communities of free citizens;" that is, of electors; for the expression, "free citizens," is, in our Constitutions, synonymous with the term electors; and no one maintains that "citizens," simply as such, either of a State or of the United States, hold or ever held political power. The union of these "political communities," under a common Constitution, that Constitution designates as the United States. And the preservation of these States, and the maintenance of their governments, "are as much within the design and care of that Constitution as the preservation of the Union and the maintenance of the national government." This, as is evident, is just such a fundamental and all-comprehensive interpretation of the Federal Constitution as was necessary from the beginning; and the opinion of the court in the case may be unreservedly accepted, not only as a clear and conclusive exposition of the legal *status* of the seceded States during "the late unpleasantness," but also as foreshadowing the grounds of its later decisions of questions arising in consequence of the war. The grand and fundamental stand-point of that court is, "that the Federal Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States as political communities of free citizens, each occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written Constitution and established by the consent of the governed." "*In all its provisions*," therefore, the common Constitution is to be so judicially construed as to equally secure the preservation of the States and the maintenance of their governments on the one hand, and the preservation of the Union and

the maintenance of its government on the other. "The people" appear to have taken the same view. When they saw that the existence of the Union was endangered, they promptly espoused its cause and its government. When they shall see that the existence of the States is endangered, whether from the tendency to centralize all power in the government of the Union, or from any other cause, they will doubtless as promptly assert and maintain their sovereignty as "political communities of free citizens," each having its own territory, its own Constitution, its own government and its own laws. It is hardly probable that in suppressing a rebellion, the several political communities which remained true to their constitutional relations meant the creation of a power which could exist only in their downfall and ruin. If they did not, they will insist upon an interpretation and construction of the Federal Constitution which recognizes their true character and essential sovereignty as such communities.

There is doubtless a well-understood distinction between the internal and the external sovereignty of political States; a distinction analogous to that between the absolute and relative rights of persons. The internal sovereignty of a State relates to whatever peculiarly concerns itself—its preservation, self-government and domain. Its external sovereignty relates to affairs in which others with itself are equally interested. In the exercise of the one, its power is unlimited; while in the exercise of the other, it must be controlled by the law of nations and its compacts or treaties with other States. The principle of this distinction has always been recognized in our system of governments. On no other ground can be reconciled the decisions of the Supreme Court of the United States, involving the power of Congress to regulate commerce with foreign nations and among the several States. This power is not limited by its terms. But in its judicial construction, that Court has held and applied the rule that whatever commerce is confined, in its operation and effects, within the bounds of a particular State, is to be regulated by the government of that State; and whatever commerce extends, in its operation and effects, beyond the bounds of a particular State, so as equally to affect other States, is to be regulated by the government of the United States: *Gibbons vs. Ogden*, 9 Wheat., 194; *Gilman vs. Philadelphia*, 3 Wallace's Rep., 713; *Pennsylvania vs. Wheeling Bridge Co.*, 13 How. U. S. R., 518; 18 How. U. S. R., 421; *Wilson vs. Blackbird Creek Co.*, 2 Pet. 245. Here the internal sovereignty of each State is recog-

nized. And consequently, from the imperial point of view, these decisions are perfectly irreconcilable. (See Pomeroy's Constitutional Law, § 371). But the Federal Constitution was neither framed nor adopted from that point of view. (See Elliot's Debates, vol 2, p. 418; The Federalist, No. 37, pp. 163-165). Each of the United States is internally sovereign, and is governed by its own Constitution, that is, by its own will. The external sovereignty of all in their relations to each other as political communities, is their common sovereignty, their common will, which is expressed (so far as at all made known) in their common Constitution; while, in their relations to foreign nations, they are one—one in peace and in war, in their treaties and all their rights, by the law of nations. The right of eminent domain has always been claimed and exercised by each of the States in virtue of its internal sovereignty. And, therefore, the confiscation of enemy's property within the domain of a State might seem to fall within its exclusive jurisdiction. (See *Ware et al. vs. Hilton*, 3 Dall., 199, 222-225.) But this is an exercise of the war power; a power which, so far as it relates to self-preservation, is doubtless retained by each State; so far as it relates to foreign nations, is clearly confided to the national government. The exercise of powers involving their common relations to each other, and to foreign nations, belongs to their external sovereignty, and is properly confided to their common government. And being one as to their common sovereignty and common government, and as to the law of nations, that government could rightfully apply that law to its war with States in rebellion, while looking to its own Constitution for the powers of war and for powers concerning the restoration of the constitutional relations of the rebellious States. The necessary measures for restoring their constitutional governments would involve the qualifications of electors. Because, from the necessities of the case, and the common usage of nations, persons who had wielded the power of the rebellion would be excluded from all share in the sovereignty. As the constitutional relations and governments of those States should become restored, all externally imposed restrictions would become thereby annulled, and each several body of electors would exist as a self-constituted and self-incorporated body, possessed of sovereign power, just as before the rebellion.

It can not but be evident that it is only as *self-constituted* and *self-incorporated* bodies of electors, that the States of the Union now are, or ever were, sovereign, or that they ever ordained and

established their State Constitution, or ratified the Constitution of the United States. A State Constitution, then, as between the several free citizens, or sovereign electors, composing a State, is clearly a compact between those several individual sovereigns; as to those who hold power under it, it is the Supreme law of the State, and declares itself so to be. In like manner, the Constitution of the United States, as between the several sovereign bodies of electors composing the United States, is a compact between those several sovereign bodies; while as to those who hold power under it, it is, and declares itself to be, the supreme law of the United States.

If the character of the one is not changed by the fact that the State government equally affects all the people of the State, neither is the character of the other changed by the fact that the United States government equally affects all the people of the United States. Hence, the proposition that one of these States, or bodies of electors, being sovereign, could not oblige itself to permanently abide by the common will of the society of States, of which it became a member, is not more easily maintained by argument than its necessary counterpart, that one of the individual electors, one of "the people," being sovereign, could not oblige himself to permanently abide by the common will of the electoral body, or society of individuals, of which he became a member. The restrictions imposed upon the liberty of any one of the individual electors composing a State, are self-imposed. So, too, those imposed upon the sovereignty of any one of the States composing the Union, are also self-imposed. The obligation resulting, in either case, is one of natural persons, or of bodies of natural persons, and not of governments. If then, an individual elector can not annul his compact and defy his State, how can a State, a body of electors, annul its compact and defy the United States? The argument that the bond in either case is only one of plighted faith, amounts to absolutely nothing. For a child needs not to be told that a political system which rests upon common consent, rests upon nothing but plighted faith.

It follows that the sovereign power of final decision belongs no less to each individual elector of a State in relation to his confederates, than to each individual State of the Union, in relation to its confederates. If his decision upon a question of his liberty must yield to the decision of the constitutional majority of his confederates, so too the decision of a State on a question of its sovereignty must likewise yield to the decision of a constitutional majority of its confederates. In either case, however, the power of majorities is limited by the

principle of equal rights. The constitutional majority can, therefore, impose upon the minority only what they equally impose upon themselves. But the power even of constitutional majorities is still further limited by the fundamental principles which were unanimously admitted to govern in the formation of the social compact or organic law. If, therefore, even a constitutional majority should change the organic law so far as to totally subvert those fundamental principles, their action would necessarily cease to bind the minority. In the familiar language of some of our State constitutions, the doctrine of non-resistance of arbitrary power is absurd, slavish and destructive of the good and happiness of mankind. And upon universal principles of natural right, applicable alike to individuals and to States, it is only in matters which involve their relations to each other, and which are of common and equal importance to all in their common character of members of the same society, that even the will of all is the law of all. For a man is not by nature so far his own master that he can alien his nature or the rights which are essential to the enjoyment of his nature.

In these ominous times, when the real issue is nothing less than the *sovereignty of government* or the *sovereignty of "the people,"* a further recurrence to fundamental principles and ancient landmarks might not be unimportant to those whose profession it is to know and whose vocation it is to defend the right. But the design of this essay is accomplished if the true relation of "the people" to their constituted governments has been ascertained and defined.

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## *The Thirteenth and Fourteenth Amendments.*

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When the Constitution of the United States was presented to the States for ratification, and soon after its adoption, there was great jealousy of the new Federal Government. This feeling was the cause of the adoption of the first eleven amendments to the Constitution, all of which were intended to protect the States from the encroachment of the General Government. They were added to the Constitution so soon after the adoption of that now venerable instrument, that we are justified in viewing them as a part of the original compact.

The intention that prompted the first eleven amendments was in direct opposition to that which suggested those that are the subject of this article. The former imposed restraints upon the Federal Government; the latter limit the powers of the State governments. The history of the revolution that preceded the adoption of the Thirteenth and Fourteenth Amendments is known to the civilized world.

“The institution of African slavery, as it existed in about half of the States of the Union, and the contests pervading the public mind for many years between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort on the part of most of the States in which slavery existed, to separate from the Federal government and to resist its authority. This constituted the war of the rebellion, and whatever auxilliary causes may have contributed to bring about the war, undoubtedly the overshadowing and efficient cause was African slavery. In that struggle slavery as a legalized social institution perished.”<sup>1</sup>

The Thirteenth Amendment embodies an expression of the national concurrence in, and perpetuation of, an inevitable result of the war.

It was proposed by the Congress on the 1st of February, 1865, and is in the following words:

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States or in any place subject to their

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<sup>1</sup> Slaughter-house Cases, 16 Wall., 36.

jurisdiction. The Congress shall have power to enforce this article by appropriate legislation."

It has been urged in a very ingenious argument before the Supreme Court of the United States, that the word servitude in this amendment included servitudes attached to property; but Mr. Justice Miller, delivering the opinion of the court, said: "To withdraw the mind from the contemplation of this grand, yet simple, declaration of the personal freedom of all the human race within the jurisdiction of this government, a declaration designed to establish the freedom of four millions of slaves, and with microscopic search endeavor to find in it a reference to servitudes which have been attached to property in certain localities, requires an effort, to say the least of it. That a personal servitude was meant is proved by the use of the word involuntary, which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the kind of servitude meant."<sup>1</sup>

But the word servitude is obviously of much broader meaning than slavery; and although the idea of abolishing and preventing African slavery was in the mind of the Congress when they proposed this amendment, it certainly embraces with its prohibitory power all kinds of involuntary servitude, except as a punishment for crime after conviction. So, if the importation and colonization of laborers, Mexican peonage, or the Chinese coolie system, were to develop a kind of slavery or involuntary servitude in any of the United States, or in any place subject to their jurisdiction, this amendment would render such institution void. As long as this amendment exists there can never be in this government any description of slavery or involuntary servitude, whether serfage, villanage, vassalage, peonage or apprenticeship.

It will be observed that this amendment does not prevent involuntary servitude as a punishment for crime whereof the party shall have been duly convicted, but it does prohibit any power of the States, or of the United States, requiring labor of one who is imprisoned and awaiting his trial.

How far the legislatures of the States may go in the enactment of laws for the apprenticing the children of the poor without coming in conflict with this amendment, is a question for future judicial decision. Laws upon that subject might go to an extent that would conflict with this amendment. Most, if not all, of the States now have statutes upon this subject, and it may be that the provisions of

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<sup>1</sup> 16 Wallace, 36.

some of them create an involuntary servitude which was intended to be prohibited. The statute of Alabama upon this subject provides "that if any apprentice leaves the employment of his master without his consent, such master may pursue and arrest such apprentice, and bring him before any Justice of the Peace of the county, who must remand such apprentice to the service of his master,"<sup>1</sup> etc. I do not think this statute in conflict with the Thirteenth Amendment, and only allude to it to suggest a character of question likely to arise in the construction of this amendment.

After the adoption of the Thirteenth Amendment, some of the former slave States passed laws relating especially to the African race. Disabilities were imposed upon former slaves. In some instances, they were denied the right to appear in the towns, except in the capacity of menial servants. They were denied the right to purchase land. They were not permitted to testify in cases where a white man was a party. I have no doubt that some of these statutes were needlessly oppressive, while others of them were necessary police regulations in districts that had recently experienced the demoralizing influence of a revolution, and were thickly populated by a newly freed race. However this may be, there is no doubt but that the course of the Southern States, together with the misrepresentations current about them, induced the proposition and adoption of the Fourteenth Amendment. It was proposed by the Congress on the 16th of June, 1866. Only the first section will be commented upon in this article. It is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Citizenship of the United States, and of a State, is defined in the first sentence. Prior to this amendment, neither the Constitution, nor any act of Congress, if we except the Civil Rights bill, contained a definition of citizenship in our complex government. It was the generally received opinion, that no man was a citizen of the United States otherwise than by being a citizen of one of the States

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<sup>1</sup> Rev. Code Ala., 1457.

composing the Union.<sup>1</sup> But a distinction is now clearly made between citizenship of the United States and citizenship of a State. One must reside in a State to become a citizen of it, but it is necessary only that one should be born or naturalized in the United States, and subject to their jurisdiction, to be a citizen of the Union. One can be a citizen of the United States without being a citizen of a State, but one can not be a citizen of a State without being a citizen of the United States. Citizenship of a State includes citizenship of the United States, and yet citizenship of the United States is the primary citizenship in this country, State citizenship being secondary and derivative, depending upon citizenship of the United States, and the citizen's place of residence.

In a speech upon the civil rights bill, which contained the phrase "all persons born in the United States, *and not subject to any foreign power or tribal authority*, shall be citizens of the United States,"<sup>2</sup> Senator Reverdy Johnson propounded the interrogatory to "what period does this phrase relate?" Senator Trumbull replied that it related to the time of birth and not to the date of the controversy.<sup>2</sup>

Now, the Fourteenth Amendment uses an expression about which a similar question will be one day asked: "And subject to the jurisdiction thereof." When? At the date of the controversy, or at birth? I do not think this phrase has ever been the subject of judicial construction. But the context sheds such a light upon it as to leave but little doubt as to its proper construction. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof." It certainly would be necessary that previous to the controversy the person should be born or naturalized in the United States, otherwise his claim to citizenship would be without foundation. Now, he might be born into citizenship of the United States, and with their permission renounce his allegiance, and become the citizen of another nation, and be no longer subject to the jurisdiction of the United States.<sup>3</sup> Then, in a controversy based upon facts which occurred after such expatriation, it could not be held that such person was still a citizen of the United States, although he was born subject to their jurisdiction. I think, therefore, that it is a natural conclusion, and that the courts will hold that the phrase "subject to the jurisdiction thereof," relates to the date of the controversy.

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<sup>1</sup> Calhoun's works, vol. 2, p. 242.

<sup>2</sup> 1 Part, 1st Session 39th Congress, p. 506.

<sup>3</sup> 2 Kent Com., 6-10.

In this section it is declared that no State shall by law abridge the privileges or immunities of citizens of the United States.

The words privileges and immunities are found in the articles of the old confederation, and are not new to the Constitution as originally adopted. "The citizens of each State are entitled to the privileges and immunities of citizens in the several States," under Section, 2 of Article IV, of the Constitution. It is important to observe that the section quoted refers to the privileges and immunities of citizens of the States, and that the Fourteenth Amendment protects only the privileges and immunities of citizens of the United States.

The former was framed to protect the rights of the citizens of the several States; the latter embraces with its protective power only those rights arising out of the national citizenship. The expression, as used in the Constitution originally, has been uniformly confined to those privileges and immunities which are fundamental, and belong of right to the citizens of all free governments.<sup>1</sup> The words, however, as used in the Fourteenth Amendment have never been judicially defined. In the Slaughter-house cases, the court, alluding to the words, say: "We may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving these privileges may make it necessary to do so."

In the very interesting case of *Bradwell vs. The State*,<sup>2</sup> the Supreme Court of the United States held, "that the right to practice law in the State courts is not a privilege or immunity of a citizen of the United States within the meaning of the first section of the Fourteenth Amendment to the Constitution of the United States." The result of this decision was to affirm an opinion of the Supreme Court of Illinois, which denied to Mrs. Myra Bradwell, the talented editor of the Chicago Legal News, the right to practice law in that State.

In the Slaughter-house cases so often referred to in this article, which, however, were decided by a bare majority of the judges, the opinion of the court seems to point in the same direction. The Legislature of Louisiana passed an Act, granting a corporation created by it, the exclusive right for twenty-five years, to maintain slaughter-houses within the parishes of New Orleans, Jefferson and St. Barnard, in that State, and prohibiting all other persons from

<sup>1</sup> 4 Wash. Cir. Ct. Rep., 371; 12 Wallace, 430; 16 Wal. 76.

<sup>2</sup> 16 Wallace. 130.

having slaughter-houses within those limits. The court held, Mr. Justice Miller delivering the opinion, that the power of granting this exclusive right was not forbidden by the first section of the Fourteenth Amendment to the Constitution of the United States; that it was an exercise of the police power properly within the control of the State.

In several of the States there are penal statutes prohibiting the intermarriage of the white and black races. Since the passage of the civil rights bill and the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of these statutes has been tested with varying results. The Alabama statute upon this subject, is as follows: "If any white person and negro, or the descendant of any negro to the third generation inclusive, though one ancestor of each generation was a white person, intermarry or live in adultery with each other, each of them must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than two nor more than seven years."<sup>1</sup> In the case of *James Burns vs. State of Alabama* (Head notes, June Term, 1872), the Supreme Court of Alabama held, that the above statute which prohibits the intermarriage of whites and blacks, when applied to citizens of the United States, or of the State, is repugnant to section first of the Fourteenth Amendment to the Federal Constitution. ●

The statute of Indiana upon this subject is: "No person having one-eighth or more of negro blood shall be permitted to marry any white woman of this State, nor shall any white man be permitted to marry any negro woman or any woman having one-eighth or more part of negro blood, and any person who shall knowingly marry in violation of the provisions of this section, shall, upon conviction thereof, be imprisoned in the State prison not less than one nor more than ten years, and be fined not less than one thousand dollars, nor more than five thousand dollars."<sup>2</sup> The Supreme Court of Indiana held, Buskirk, J., delivering the well-matured opinion, that the statute in question was not abrogated by the Act of Congress, known as the civil rights bill, or by the Fourteenth Amendment to the Federal Constitution. In this case the court said: The learned attorney for the appellee has not informed us in his brief, which one of the clauses of the said section has had the effect to abrogate our laws prohibiting the intermarriage of persons

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<sup>1</sup> Revised Code of Ala., 3602.

<sup>2</sup> 2 G. & H., 452.

of the white and black races. It certainly can not be the first, for the only object and effect of that clause was to confer the right of citizenship upon certain classes of persons who had not been theretofore citizens, and among these classes were persons of the African race. Nor can the second clause be construed to have that effect. The purpose of this clause was to secure to the newly created citizens, the same privileges and immunities which had theretofore been enjoyed by the former citizens of the United States. It is quite probable that this clause had reference to the political rights and privileges of the persons who had by the first clause been made citizens of the United States and of the State wherein they reside. The purpose of the third clause was to protect the persons referred to, and embraced in the first clause, in life, liberty and property. The plain and manifest intention was to make all the citizens of the United States equal before the law in all the States of the Union. The fourth clause seems to have been added in abundance of caution, for it provides in express terms what was the fair, logical and just implication from what had preceded it, and that was, that the persons made citizens by the Amendment should be protected by the laws in the same manner and to the same extent that white citizens were protected. . . . Under the police power possessed by the States, they undoubtedly have the power to pass such laws. The people of this State have declared that they are opposed to the intermixture of races and all amalgamation. If the people of other States desire to permit a corruption of blood and a mixture of races, they have the power to adopt such a policy. When the Legislature of this State shall declare such policy by positive enactment, we will enforce it. But until this is required, we shall not give such policy our sanction.<sup>1</sup>

There has been no case before the Supreme Court of the United States involving the point now under discussion, but I think the construction which that Court has placed upon the Fourteenth Amendment, in the cases already quoted in this article, points towards a dissent from the view taken by the Supreme Court of Alabama, and a concurrence in the opinion of Mr. Justice Buskirk, in the case of the *State vs. Gibson*.

It can not be successfully contended that a statute of this kind is in conflict with that part of the Fourteenth Amendment which declares that no State shall, by law, abridge the privileges or immunities of citizens of the United States, for there can be no doubt

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<sup>1</sup> *State vs. Gibson*, 36 Ind., 389; S. C. 10 Am. R., 42.

but that the privileges and immunities alluded to in that clause are only those which relate to citizenship of the United States, and arise out of the nature and essential character of the National Government.

It will be observed that both the Alabama and the Indiana statute impose the same penalty upon the white man who marries the negro woman that is imposed upon the negro man who marries the white woman. This frees these statutes from making an unequal distinction between the parties specified on account of race, color or previous condition of servitude. The law does not object to distinctions, if they are distinctions without inequality. The *status* of a person is frequently an element of an offense. The law pronounces it incest, and punishable, for a man to marry his sister. If he marry her, his *status*, or state of being kin to her, is an element of the offense. Laws upon the subject of gaming with minors, selling liquor to them, etc., suggest examples of instances where the *status* of a person concerned is an element of the offense. If a law is equal in its prohibition and in its infliction of punishment upon those who violate it, it can not be properly held unconstitutional, because it regulates the intercourse between the white and black races in a manner conducive to the interest of both.

It is an unnatural construction to place upon the Fourteenth Amendment to say that it abrogates the statutes. The Congress did not intend to destroy the purity of our race when it submitted this amendment to the people, nor did the people in adopting it vote for amalgamation. God has made the races dissimilar. The instincts with which he has endowed them indicates that they should not overstep the line that he has drawn between them. Their separation upon the surface of the globe is visible in the providential arrangement of the earth. The natural separation of the races is an undeniable fact, and all social organization that leads to their amalgamation or intermarriage, is repugnant to the law of nature. A construction producing such results should not be given to the Constitution of our country, unless its letter and spirit clearly demand it.

Section first of the Fourteenth Amendment concludes with the provision, that no State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. It will be observed that here the word citizen of the United States is dropped and the word person substituted. No *person* shall be deprived of

life, liberty or property. Every *person* is secured in the equal protection of the laws. The justice and humanity of this part of the amendment will commend it to every one.

Sir James McIntosh said that constitutions were not made, that they grew. And the Constitution of the United States has grown up in the midst of clashing opposition between those who favored a strong central government, and those who advocated the States' rights doctrine. Partisanship has led the latter into the error of secession; partisanship, it is feared, will carry the former into the vortex of a fatal centralization. The protection of the country is the Constitution and the Courts. The heat of these advocates of adverse theories has never affected the high Courts of our country. Before the last revolution, in the midst of all the excitement generated by political agitation, Marshall, Taney and their distinguished judicial contemporaries held the scale of justice in steady hands, and construed the Constitution neither for nor against the General Government, but impartially. The Constitution itself has grown with our history. Its recent growth has conferred powers upon the General Government which it never before claimed, and deprived the States of power which they theretofore exercised. But the federal character of the Government still exists. There is still a line to be watched—a line of limitation—upon one side of which are marshalled the delegated powers of the General Government—upon the other the retained powers of the State Governments. To preserve this distinction and division of powers, the people look confidently to the Courts and to the Constitution.

D. D. SHELBY.

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## *The Philosophy of Punishment.*

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There is no part of legal science more deserving of the study of lawyers than Punishment, and, I may add, there is no part which receives less of their study. The question of punishment is one which, though purely legal, has in the past few years assumed a political phase, and is discussed by journalists who, because of their non-professional training, would hesitate to discuss many other questions of criminal jurisprudence.

In this paper, I shall not in anywise discuss the subject of punishment except in its legal phases. Of that punishment which mixes mercy I do not speak. Of that punishment which was voiced by Christ, and says to the criminal, "Repent and be saved," I do not speak.

Punishment is solely a science of effectiveness. Much as men may try to make it a casuistic question they must fail. Even the old clause which said "for the reform of the criminal," is a surplusage in the definition of the object of punishment. Punishment is not for the reform of the criminal, and that question is never considered by the lawgiver in fixing punishments. The English law, a hundred years ago, made forgery a capital offense. Men instance this as a barbarous punishment. From a stand-point of sentimentalism we might say so as well, but as a question of law is it to be condemned? In preventing forgery, was the death penalty more effective than a less penalty would have been? If it was, and we consider the question in a purely legal light, the death punishment ought not to have been abolished. As sentimentalists, we say that the laws of Draco—no matter what the effect of them—were deplorable, inasmuch as they punished every offender with death. As lawyers, we say that if Draco's bloody statutes caused less crime in Athens than other penalties would have caused, they ought to have been retained. I may here remark, however, that I do not think heinous punishments as effective as milder punishments.

In considering the degree or character of punishment which should be fixed for offenses, we should consider what punishment will best fulfill the object of the law. Human reason says now, as it has always said, that the purpose of all criminal law is the prevention of crime, and this bare proposition is universal. Every

nation, however barbarous, has some idea of justice, and therefore some sort of crime, and some sort of punishment. The differences, then, are not concerning the objects but the meaning of the law; not concerning the purposes but the sorts of punishment; not concerning the entity but the constituents of crime. The question which has presented itself to all communities, savage or civilized, is this, What is crime? The answering of this is the criminal law, and this law varies according to the savagism or civilization of each community. Thus, the crime of an American may be the virtue of an Arab; a punishment among Christians may be a purification among Mohammedans. All nations and all religions are agreed that crime should be punished, and every nation does punish such acts as are criminal *according to its criterion*.

There are no people so unenlightened but that they have a concrete idea of justice. Necessarily, this sort of justice is as variable as the opinions of its administrators, and is simply an exercise of power. Consequently, we find all learned and estimable lawgivers endeavoring to establish such a philosophy—such abstract ideas—of justice, as would subordinate to it all enforcement laws. From this legal idea was evolved the political idea of constitutions. Wherever abstract justice is supreme, practical justice always exists. Abstract justice had no sooner been firmly founded in England than the desire to make it an actuality caused the formation of Courts of Equity. These conscience-courts were simply attempts at the vitalization of civil justice. So, lynch law results from a predominance of ideas of concrete justice.

The first problem which presented itself to legists was to fix a ratio of crimes, and, perforce, proportional punishment. The difficulty was to find a standard of crime from which to calculate punishment. Some nations regarded those crimes as most vile which violated the law of life, such as murder; other nations condemned most severely those which violated laws of honor, such as theft and forgery; while other nations reckoned those crimes most heinous which violated the peace, such as riot and conspiracy. Again, these initial ideas were modified by circumstances which were common to all political corporations; thus, cowardice was not penal in time of peace, but became so in time of war—cowardice was not more despicable in war than in peace, but it was more *dangerous*. Understanding this, we easily see that the old distinction between *mala in se* and *mala prohibita* was incorrect. Considered as a question of law they are all alike—all are *mala prohibita*; and all are *mala in se*,

the moment they receive legislative objurgation. If jurisconsults had recognized any such distinction we would have found crimes, which, morally speaking, are *mala in se*, such as lying and ingratitude, made illegal. Lawgivers have prohibited those acts only which are provably injurious; thus lying is punishable if it injures another.

Murder is nearer a universal crime than any other, and yet how many are the differences concerning the ingredients of this crime, and the tests of guilt and its punishment. It would be interesting to present a general historical review of the influence which the different forms of government have exerted upon the criminal law of countries, but to do this would require too much space for this article, and I shall only refer, as illustrative, to this influence upon the crime of murder. Among the early nations of earth, when patriarchal governments were pre-eminent, we find all laws upholding the power of the parent, and inculcating the powerlessness of the child; thus, while there were heinous punishments for parricide, and even the failure of an adult male in caring for his parents was highly penal, yet the parental power was unlimited, even to the enormity of putting the child to death. And this idea of excessive parental power was not dispelled by the overthrow of the patriarchal polity. In Rome, even at the time when Rome was the most civilized country of earth, when Roman citizenship was surer protection to the traveller than attendant soldiery, even then we see the existence of that idea in the cruel punishment of parricides, who were sewn in a sack, with a cock, a viper and an ape, and thrown into the water.

In the early governments, it will be noticed, that the criminality of a killing was dependant in a great degree upon the relative social positions of the killer and the killed. Thus, the relations of master and servant, of parent and child, of ruler and subject, were considered in the determination of the guilt or innocence of the slayer. But as the world progressed, and democratic ideas became more powerful, we see the abandonment of the old ideas of homicide, and, consequently, a revolution of that part of the law. Whatever it might be, in a moral point of view, as a legal question the lives of all men were equal. So, to-day, although we say he is a horrible human who murders a parent, yet the law visits him with no crueller punishment than it visits upon the common murderer—we have no parricide, fratricide or infanticide, but all is "homicide." This single, simple fact, is what constitutes murder with us: the taking.

of life with malice. No matter if the person killed would have died in one hour from old age or disease; if the life taken was wholly worthless; if the killed deserved death for some crime, the law still condemns the slayer for the taking of a *life*. It is this democracy of the law which is the glory of the American system; it avoids the complexities of caste and kinship, and simplifies to a single proposition all the cumbrous, exceptional statutes of the Europeans.

I have just considered the defined constituents of crime, and shall now speak of the tests of crime. Among the ancients and middle-age men, there was a continual tendency to combine religious faiths with the laws, and this caused the establishment of a sort of physical test of crime. They reasoned: God will not allow the innocent to be punished, but will expose the guilty; and in pursuance of this reasoning, they adopted such physical processes as the heated plowshares, over which an accused person was required to walk blinded. If he trod on any of the plowshares, he was adjudged guilty. Of course, this proceeding made the law a mockery, for the innocent and the guilty were equally liable to step upon a plowshare. Those people never carried an idea to more than half its logical length, for the same argument which justified in the test of the plowshares, would have justified them in destroying all laws and punishments, because (according to them) God will punish the guilty and protect the innocent, and if this is done, the object of all laws is accomplished.

This old idea of physical tests, like the old idea concerning the constituents of crime, was dispelled by the growth of democratic opinions, but it was never finally extirpated until the commencement of the American Republic. Here Church and State were separated; religion was as disconnected from temporal government as in the Apostolic period. Here, with equal freedom, the Moham-medan could bow to the crescent and the Christian bow to the cross. And here, too, for the first time in history, was recognized the equality of the lives, property and personality of every man. The tests of crime were the same for all sorts of people—the religious and the irreligious, the affluent and the poor, the official and the citizen, all were amenable to the same statutes and entitled to the same rights. Discarding the dogmas of the monarchists, concerning the infallibility of rulers, our national founders made no exception, not even as to the President. They made all tests of crime intellectual tests.

Having considered the tests of crime, and the constituents of crime, as related to punishment, I come next to punishment itself. In this too, democratic ideas have wrought a revolution. There is not now a block for the prince, and a gallows for the peasant, but the same modes and the same severity are used in the punishment of both. Punishment, strictly speaking, is no more or less than a *due*. Government itself had its origin in the idea of giving to every man his *due*. To the true citizen, government gives protection as his *due*. To the felon Government gives punishment as his *due*. The question then in determining the degree of punishment is simply the ascertainment of the amount of punishment *due*. How should this amount be calculated? This is the query I purpose to discuss in closing this article.

There is this elemental difference to be noted between the legal and religious ideas of punishment. In the first, there is a sort of gradation; in the second, there is a uniform penalty for every sort of violation. Most religionists hold, that all offenses having received the same Biblical prohibition, will receive the same punishment; that each unrepented sin is so flagitious that it deserves the most unmixed suffering. The idea of Draco, the Pagan, was like this. When asked why his punishments were so severe, he replied that the smallest crime deserved the greatest conceivable punishment. But this idea was never firmly established, but was soon overthrown, and the idea of ratio substituted, being varied, as I have said, by the proclivities of different peoples. Since this rule of ratio became a part of the changeless, universal code, the great outcry which has followed civilization has been for mild punishments. And the laws have steadily yielded to this invasion, until now it seems as if the sentimentalism of people is to measure legal retribution.

Two States of this Union have an institution of punishment called the whipping-post, and the press of the country are nearly united in condemning it as a "relic of barbarism." But is this a proper indignation? The only reason which should influence us in commending or condemning, is that of efficacy. Is the whipping-post more efficient than other punishments in the prevention of the offenses it is designed to prevent? If it is, it should be retained; otherwise, abolished. When our sentimentalism can be humored without interfering with juridical purposes, let us humor it; but if one or the other must be neglected, let it be the sentimentalism.

Even now the great press of the country are calling for the aboli-

tion of capital punishment. The purpose is right, but the clamor is wrong. Capital punishment should be abolished, because it creates more crime than it prevents, because it is alike terrorless to the hate-murderer and the gain-murderer. Not because it is "repugnant to our feelings," or "brutal," or "inconsistent with the civilization of the age." I am always loth to witness any law-change which is the result of political or polemical influence. I am always glad to see changes which are the results of legal conviction.

HORACE CHILTON.

Tyler, Texas.

## *Digest of English Law Reports for February, March and April, 1874.*

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### AGENT.

To a count for goods sold and delivered, the defendants pleaded, that the goods were sold and delivered to them by S., then being the agent of plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that S. sold the goods in his own name and as his own goods with the consent of the plaintiffs; that, at the time of the sale, the defendants believed S. to be the owner of the goods, and did not know that the plaintiffs were the owners of or interested therein, or that S. was agent; and that, before the defendants knew that the plaintiffs were the owners of the goods, or that S. was agent in the sale thereof, S. became indebted to the defendants, etc., claiming a set-off. Replication, that, before the sale by S., the defendants had the *means of knowing* that he was merely apparent owner of the goods and that the same were intrusted to him as agent, and that S. was agent, and as such sold the goods to the defendants:

*Held*, that the plea was good, and the replication no answer to it: *Borries v. The Imperial Ottoman Bank*, vol. ix, C. P., 38.

### ANNUITY CHARGED ON CORPUS.

Testator gave all the residue of his real and personal estate to trustees for a term of eleven years from his decease, upon trust to pay out of the rents, interest, dividends, and proceeds certain life annuities; and he directed that the residue of the rents, etc., should, during the term, be accumulated for the benefit of the person who should become entitled to the residue of his personal estate at the expiration of the term; and after the determination of the term he devised his real estate, subject to and charged with the payment of the annuities for the residue of the lives, with powers of distress and entry for the recovery of the same, as if the same had been secured by a lease for years, unto the trustees in strict settlement:

*Held*, that the arrears and the annuities were not charged upon the *corpus* but upon the income, and must be paid out of the income and future income, so far as any might be required: *Taylor v. Taylor. In re Taylor's Estate Act*, vol. xvii, V.-C. H., 324.

### BAILER.

Where a livery-stable keeper undertakes for reward to receive a carriage and lodge it in a coach-house, the case comes within the second class of the fifth sort of bailment mentioned by Holt, C. J., in *Coggs v. Bernard* (2 Ld. Raym., at pp. 917-918), viz., a delivery to carry or otherwise manage for reward, to a private person, not exercising a public employment; and he is bound to take reasonable care. The obligation to take reasonable care of the thing intrusted to a bailee of this class, involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing deposited may be reasonably safe in it; but no warranty or obligation is to be implied by law on his part that the building is absolutely safe. The fact that the building has been erected for the bailee on his own ground makes no difference in his liability. The plaintiff brought his horses and two carriages to defendant, a livery-stable keeper; the carriages were

placed under a shed on defendant's premises, a charge being made by defendant in respect of each. The shed had just been erected, the upper part being still in the hands of workmen. Defendant had employed a builder to erect the shed for him, as an independent contractor, not as defendant's servant, and he was a competent and proper person to be so employed. The shed was blown down by a high wind, defendant being ignorant of any defect in it, and the carriages were injured; upon which plaintiff brought an action against defendant. At the trial, the above facts having been admitted, the judge rejected evidence to prove that the fall of the shed was owing to it being unskillfully built through the negligence of the contractor and his men; and he nonsuited the plaintiff, ruling that the defendant's liability was that of an ordinary bailee for hire, and that he was only bound to take ordinary care in the keeping of the plaintiff's carriages, and that if he had exercised in the employment of the builder, such care as an ordinary careful man would use, he was not liable for damage caused by the carelessness of the builder, of which he, defendant, had no notice:

*Held*, that the nonsuit and ruling were right:

*Readhead v. Midland Ry. Co.* (Law Rep., 4 Q. B., 379), and *Francis v. Cockrell*, (Law Rep., 5 Q. B., 184, 501), distinguished: *Searle v. Laverick*, vol. ix., Q. B., 122.

#### BANKER'S LIEN.

Bankers who, according to the usual custom in London between bankers and stock-brokers, made, upon the security of share certificates and other property deposited with them, advances to a stock-broker for specific purposes:

*Held*, not to have a general lien on boxes and their contents deposited with them for convenience and safe custody by the same stock-broker, he keeping the keys of and having constant access to the boxes, and the bankers—mere gratuitous bailees—not knowing, till after he had by inquisition been found lunatic, the contents of them; but that the committees of the lunatic were entitled to have the boxes and their contents delivered up to them, notwithstanding that the bankers had obtained a judgment in an action for the payment of the balance due to them on the lunatic's banking account; and also certain charging and garnishee orders: *Leese v. Martin*, vol. xvii., V.-C. H., 224.

#### BILL OF EXCHANGE.

A. drew a bill on B., which B. accepted. C. became the holder for value.

Before due date it was agreed between A. and C. (A. assuring C. of B.'s concurrence) that the bill should be renewed; and C. gave to A., a cheque on C. for the amount of the bill, to the intent that B. should be placed in funds to meet the original bill, and should thereupon accept the renewed bill.

A. sent the new bill to B. for acceptance, and also sent him the cheque, and B. knew the purposes for which both were sent.

B. cashed the cheque and paid the first bill, but refused to accept the second:

*Held*, that B. had no right to so appropriate the cheque without accepting the bill:

*Held*, also, that the agreement between A. and C. did not release B. from his suretyship as acceptor of the first bill: *Torrance v. Bank of British North America*, P. C. A., vol. v., 246.

#### BILL OF LADING.

*Semble*, a bill of lading, in which the words "or order or assigns" are omitted, is not a negotiable instrument.

Where goods have been delivered to the person to whom the bill of lading was

made out, and they have then been delivered to indorsees of the bill of lading, so that the indorsees unite in themselves a legal and equitable title to the goods, the omission of the words "or order or assigns" in the bill of lading is not sufficient to give the indorsees constructive notice of some equitable arrangement between the person to whom the bill of lading was made out and the consignors: *Henderson v. The Comptoir d'Escompte de Paris*, P. C. A., vol. v., 253.

#### COMMISSION.

The plaintiffs, house agents, were instructed by the defendant to offer a leasehold house for sale, for which they were to receive a commission of 2½ per cent. on the amount of premium if they found a purchaser, but one guinea only for their trouble if the premises were sold "without their intervention." The particulars were entered on the plaintiff's books, and they gave a few cards to view. One U., who had observed on passing that the house was to be disposed of, but who had not then seen over it, called at the plaintiff's office and obtained a card to view the premises in question, amongst others, the terms being written by the plaintiffs' clerk on the back of the card. U. went to the house a few days afterwards, but thought the price (2200*l.*) too high, and he went away. U. had no further communication with the plaintiffs; but he subsequently renewed his negotiations with a friend of the defendant's, and ultimately became the purchaser of the lease for 1700*l.*:

*Held*, that there was evidence for a jury that U. had become the purchaser of the premises "through the plaintiffs' intervention," and consequently that the plaintiffs were entitled to the stipulated commission. At the trial the judge put the following question to U.: "Would you, if you had not gone to the plaintiffs' office and got the card, have purchased the house?" and, overruling an objection by the defendant's counsel, received his answer, which was, "I should think not:" *Semble*, that the answer was properly received: *Mansell v. Clements*, vol. ix., C. P., 139.

#### CONSTRUCTIVE NOTICE.

C. and B., tenants in common in fee, in equal shares, of a messuage and premises, entered into partnership, and it was agreed by the articles that this property should be partnership assets; and it became the place where the business of the firm was carried on. After this B. made a legal mortgage in fee of one moiety to secure his private debt to a person who knew that the property was the place of business of the firm. Some years afterwards B. absconded, and C. was obliged to pay the debts of the firm, all of which had been contracted since the mortgage, and a large balance thus became due to him:

*Held*, that, as the mortgagee, when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, and that his claim must be postponed to that of C.; and that the circumstance of the debts paid by C. having been incurred since, the mortgage did not affect the case: *Cavander v. Bulteel*, vol. ix., L. JJ., 79.

#### CONTRACT.

Where the declaration shows substantially a contract, and a tender in compliance with it, the plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance: *McConnel v. Murphy*, P. C. A., vol. v., 203.

#### COVENANT TO SETTLE.

In a marriage settlement a covenant to settle the wife's after-acquired property

will, in the absence of expressions showing a contrary intention, be construed as applying only to property acquired during the coverture, although the words "during the said intended coverture" are omitted: *Dickinson v. Dillwyn* (Law Rep. 8 Eq. 546), and *Carter v. Carter* (Law Rep. 8 Eq. 551), approved. *Stevens v. Van Voorst* (17 Beav. 305), overruled. *In re Edwards, a person of unsound mind. In re London, Brighton, and South Coast Railways Act*, vol. ix., L. JJ., 97.

#### ESTATE OF TRUSTEES.

A testator, by will dated in 1827, devised his estate to trustees and their heirs upon trust that they and their heirs should stand seised of the same during the life of W. C., and also until the whole of the testator's debts and the legacies thereafter mentioned were paid, upon trust to set and let the same and apply the rents and yearly profits, and the value of whatever timber might be considered at its best growth, from time to time, in discharge of his debts until they were paid; then upon further trust to apply the rents and yearly profits from time to time until three legacies were paid, and from thenceforth to pay the rents and yearly profits to W. C. and his assigns during his life. And from and immediately after the decease of W. C. and the payment of the debts and legacies and all expenses incurred by the trustees, the testator devised the estate to the heirs of the body of W. C., and for default of such issue, to his own right heirs. In 1830 the trustees, by deed reciting that the debts and legacies were paid, conveyed the estate to W. C. for his life. W. C. shortly afterwards suffered a common recovery, and then mortgaged the estate in fee to W. C., and W. afterwards filed a bill against the heir of the surviving trustees and against the eldest son of W. C., praying for a declaration that W. C. took an equitable estate tail under the will, and for a conveyance of the legal fee to W. The son put in an answer submitting that W. C. took only an equitable life estate, and that the conveyance by the trustee in 1830 was a breach of trust, and asking for a declaration to that effect. A decree was made without any declaration, directing the heir of the trustee to convey his estate under the will to W., subject to W. C.'s equity of redemption, and was inrolled. After the death of W. C. his eldest son filed his bill against W. to recover the estate, on the ground that the limitation to the heirs of the body of W. C. was a contingent remainder, and that the trustees had committed a breach of trust in conveying so as to enable W. C. to destroy it by the recovery. W. by answer insisted on the inrolled decree as an adjudication on the question:

*Held*, that the trustees took a legal fee under the will; that the rule in *Shelley's Case*, therefore, applied, and that W. C. acquired a good equitable fee by the recovery.

A general devise to trustees and their heirs under a will, the purposes of which require them to have some legal estate of freehold, *prima facie* gives the fee, and it lies on the parties alleging that they take a less estate to show what less estate will serve the purpose:

*Held*, also, that the trust to set and let, which could not be confined to an authority to let from year to year, and the direction as to the timber, were grounds for not cutting down this estate:

*Held*, further, that assuming the trustees not to have taken the fee, the estate for the life of W. C., which in that view of the case was in 1830 their only estate, was held in trust for W. C. only, and not upon any implied trust to preserve contingent remainders; and that they were justified in conveying to W. C., though their doing so enabled him to destroy the contingent remainders:

*Held*, further, that as the plaintiff had not asked to be dismissed from the suit instituted by W. and W. C., but had raised the question of construction in that suit

he was bound by the decree, the direction in which to the trustee to convey his estate was a decision that he had an estate, and that the trustees had taken the fee under the will: *Collier v. Walters*, vol. xvii., M. R., 252.

#### FALSA DEMONSTRATIO.

The plaintiff entered into an agreement for the transfer of his tenancy in a public house, and the sale of the good will thereof to the defendant. The subject-matter of the agreement, which was in writing, was therein described as "the house and premises he now occupies, known by the sign of the 'White Hart.'" There was a coach-house which belonged to the "White Hart," and which, at the time of the making of the agreement, was not in the occupation of the plaintiff, but of one S., who held it as tenant to the plaintiff for a period which had not expired at the time fixed for the completion of the transfer by the agreement. The agreement contained a variety of stipulations with regard to the transfer of the licenses, the payment of rates and taxes, and the purchase of fixtures, furniture, and stock at a valuation by the defendant, and concluded, as follows: "If either party shall refuse or neglect to perform all and every part of the agreement, they hereby promise and agree to pay to the other, who shall be willing to complete the same, the sum of 100*l.* as damages, and recoverable in any of Her Majesty's courts of law." The defendant refused to perform the agreement, on the ground that it included the coach-house, and that the plaintiff could not perform his part, not being able to deliver up possession of that portion of the premises on the day fixed for completion, and the plaintiff accordingly brought his action to recover the 100*l.* as liquidated damages.

*Held*, that the words "he now occupies" formed an essential part of the description of the subject-matter of the agreement, and could not be rejected as *falsa demonstratio*, and consequently that the agreement did not include the coach-house, and the plaintiff was entitled to succeed; but that the 100*l.* was not liquidated damages, but a penalty, and, therefore, the plaintiff could only recover the damages found by the jury to have been actually sustained by him: *Reilly v. Jones* (1 Bing., 302) and *Lea v. Whitaker* (Law Rep., 8 C. P., 70), discussed: *Magez v. Lovell*, vol. ix., C. P., 107.

#### ILLEGITIMATE CHILD.

A testator, who had gone through the ceremony of marriage with M. L., his deceased wife's sister, who had two daughters, C. and E., by him, and who was *en ventre* with a third at the date of the will, gave a moiety of his property to trustees in trust for M. L. for life, and after her death, for his reputed children, C. and E., and all other children which he might have or be reputed to have by M. L., then born or thereafter to be born. The third child was born before the testator's death, and was acknowledged by him as his child:

*Held* (*dissentiente* Lord Selborne, L.C.), that the after-born child was entitled to share with her sisters under the will:

Decision of Wickens, V. C., reversed: *Hill v Crook* (Law Rep., 6 H. L., 265), *Pratt v. Mathew* (22 Beav., 328), *Blodwell v. Edwards* (Cro. Eliz., 509), *Methum v. of Devon* (1 P. Wms., 529), *Howarth v. Mills* (Law Rep., 2 Eq., 389), and *Holt v. Sindrey* (Law Rep., 7 Eq., 170), discussed: *Occleston v. Fullalove*, vol. ix., L. C. & L. JJ., 147.

#### JUDICIAL SEPARATION.

The Court refused to grant a decree of judicial separation on the ground of the husband's cruelty in a case where the wife had committed adultery, being of opinion that she did not require the protection of the court:

*Quære*, whether the court can in any case grant a decree of judicial separation on the ground of cruelty to a wife who has been guilty of adultery: *Grossi v. Grossi*, vol. iii, P. & B., 118.

#### LIABILITY OF SOLICITOR.

A stranger who acts as the agent of a trustee in a transaction legally within his power, but which leads to a breach of trust, is not to be held responsible as a constructive trustee, unless some of the property passes into his hands, or unless he is cognizant of a dishonest design on the part of the trustee.

The court discourages the practice of making solicitors or other agents who are not primarily liable for the loss of property, and who ought to be made witnesses, defendants to a suit for the purpose of charging them with costs: *Barnes v. Addy*, L. C. & L. JJ., vol. ix.

#### LIGHT AND AIR.

It is not to be laid down as a general rule that, where a building injuriously affecting ancient lights has been completed before the bill is filed, the court is unable to give damages unless the injury is such as would justify a mandatory injunction: *Durell v. Pritchard* (Law Rep., 1 Ch., 244), explained.

*Per* the Lord Chancellor: The fact that the height of a building above an ancient light is not greater than its distance is not conclusive evidence that the light is not injuriously affected, but is *prima facie* evidence of there being no such interference with the light as the court will restrain, and requires to be rebutted by special evidence of injury.

Observations as to evidence relating to obstruction of air as well as light: *City of London Brewery Company v. Tennant*, vol. ix., L. C. & L. JJ., 212.

#### MANDATORY INJUNCTION.

Where water pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, and not being required to establish his right at law.

The facts that the soil under the highway was of no value to the owner, and that his motive for applying to the Court was not connected with the enjoyment of his land, were held not to be reasons against the granting of the injunction.

Decree of Jessel, M. R., affirmed. *Deere v. Guest*, (1 My. & Cr. 516) commented on. *Goodson v. Richardson*, vol. ix., L. C. & L. JJ., 221.

#### MASTER AND SERVANT.

The defendant agreed to serve the plaintiff as a traveller and agent "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice."

*Held* (by Bramwell and Pigott, BB., Kelly, C. B., dissenting), that at the close of the twelve months the agreement could be determined by either party without any notice, and that the stipulation as to a three months' notice only applied in case the engagement was prolonged beyond the twelve months: *Langton v. Carleton*, vol. ix., Ex. 57.

#### NEGLIGENCE.

The plaintiff was a passenger on the defendants' railway from A. to B.; while the train was passing through B. station, the company's servants called out the name of the station, and shortly afterwards the train stopped. The carriage in which the plaintiff travelled stopped a little way beyond the platform, and several carriages

and the engine, which were in front of that carriage, stopped at some distance from the platform. The plaintiff who was well-acquainted with the station, in alighting from the carriage was thrown down and injured in consequence of the train being backed into the station for the purpose of bringing the carriages alongside the platform. A very short interval elapsed between the time that the train stopped and the time it was backed into the station :

*Held*, that there was no evidence of negligence on the part of the company to render them liable to an action: *Lewis and Wife v. The London, Chatham and Dover Railway Company*, vol. ix, Q. B., 66.

**PRECATORY TRUST.**

Testator appointed his wife sole executrix, and left to her all his property, landed and personal, of every description, for her sole use and benefit, in the full confidence that she would so dispose of it amongst all their children, during her lifetime, and at her decease, doing equal justice to all of them :

*Held*, that the wife took a life interest, with a power of appointment amongst the children, as she might think fit: *Curnick v. Tucker*, vol. xvii., V.-C. H., 320.

# *Digest of United States Supreme Court Decisions.*

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[From 17th Wallace.]

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## **BANKRUPT ACT.**

1. Under the thirty-fifth and thirty-ninth sections of the Bankrupt Act, more than passive non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property when the debt is due, and he has no defense: *Wilson v. City Bank*, 473.

2. In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law: *Ib.*

3. Though the judgment creditor in such a case may know the insolvent condition of the debtor, his judgment and levy upon his property are not, therefore void, and are no violation of the act: *Ib.*

4. A lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after levy of the execution or rendition of the judgment: *Ib.*

5. Very slight circumstances, however, the value of which must be judged of in each case as it arises, which tend to show the existence of an affirmative desire on the part of the bankrupt to give a preference or to defeat the operation of the act, may, by giving color to the whole transaction, render the lien void: *Ib.*

6. The twentieth section of the Bankrupt Act was not intended to enlarge the doctrine of set-off beyond what the principles of legal or equitable set-off previously authorized: *Sawyer v. Hoag*, 610.

7. Where personal property has been sold by one insolvent, and immediately afterwards decreed a bankrupt, without any change of possession, and is thus void under the rule, in *Twyne's case*, by the laws of the State where the transfer is made the assignee in bankruptcy may pursue it, and as auxiliary to its recovery, ask that the sale by the bankrupt be annulled: *Allen v. Massey*, 352.

## **COMMON CARRIER.**

1. Can not stipulate for exemption from responsibility for the negligence of himself or his servants: *Railroad Company v. Lockwood*, 357.

2. The rule applies to the case of a drover travelling on a stock train to look after his cattle, and having a free pass for that purpose: *Ib.*

## **CONSTITUTIONAL LAW.**

1. A municipal corporation is a portion of the sovereign power of the State and is not subject to taxation by Congress upon its municipal revenues: *U. S. v. R. R. Co.*, 322.

2. The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every other State, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit: *Board of Public Works v. Columbia College*, 521.

3. No greater effect can be given to any judgment of a Court of one State in another State than is given to it in the State where rendered: *Ib.*

4. "Police law" passed by a State distinguished from a "regulation of commerce," and sustained on the distinction between the two: *Railroad Company v. Fuller*, 560.

#### CONSTRUCTION.

Where a State had publicly promised that the notes of a bank in which it was the sole stockholder, and for whose bills it was liable, should be taken in payment of taxes and all other debts due the State and so impressed the credit of the State upon the notes:

*Held*, that when the State afterwards intended to terminate this obligation (as it could do upon reasonable notice as to after-issued bills), it was bound to do it openly, and in language not to be misunderstood. As a doubtful or obscure declaration would not be a proper one for the purpose, so it was not to be imputed: *State v. Stalls*, 425.

#### CONTRACT.

1. What one party to a contract understands or believes is not to govern its construction, unless such understanding or belief was induced by the conduct or declaration of the other party: *Bank v. Kennedy*, 19, and see *Baily v. Railroad Company*, 97.

2. Where the validity of a contract made by an agent of the Government is disputed by the Government, and a commission appointed by the Government to pass on its validity reports, after inviting parties interested to appear before it, that the contract be confirmed to a partial extent and on conditions, or otherwise, be held null, and the other party acts after this upon the condition prescribed:

*Held*, that his action is voluntary, and that the original contract is modified: *Mason v. U. S.*, 67.

3. Where a claim is disputed by the Government, and the claimant accepts a certain sum in settlement thereof, and gives a receipt in full therefor, a subsequent action in the Court of Claims for any residue asserted to be due is barred: *Sweeney v. U. S.*, 75.

#### COURT AND JURY.

The rule of law that the interpretation of written instruments is a question of law for the court, is applied with full force to agreements to be deduced from the correspondence of the parties, and the fact that the language of the letters containing the offer or acceptance is doubtful, does not relieve the court of this duty, or make the question one of fact for the jury: *Goddard v. Foster*, 123.

#### DEPOSITION.

A notice without date, to take depositions at a time specified, "in the city of Guilford, State of Maine," insufficient to let in depositions taken "in the town of Guilford," it not appearing that the town and city were the same, and the defect not being cured by attendance of the opposite party: *Knobe v. Williamson*, 586.

#### EQUITY.

Capital stock or shares of a corporation, especially the unpaid subscription to such stock or share, constitute a trust fund for the benefit of the general creditors of the corporation, and this trust can not be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith: *Sawyer v. Hoag, assignee*, 610.

**ESTOPPEL.**

This subject largely investigated, and the nature and effect, extent and limits of estoppels, both legal and equitable, defined: *Branson v. Worth*, 32.

**EVIDENCE.**

1. Parol evidence inadmissible to show how all the parties in interest understood a long and rather intricate transaction, from its commencement to its consummation, the same being all in writing: *Bailey v. Railroad Company*, 96, and see *Bast v. Kennedy*, 19.

2. Evidence of fraud not required to be more direct and positive than that of facts and circumstances tending to the conclusion that it has been practiced: *Rea v. Missouri*, 532.

3. Evidence of a vendor of land, being positive, is sufficient to rebut a presumption, arising from taking a note with surety for the payment of the purchase money of the land, that the vendor's lien had been displaced: *Cordova v. Hood*, 1.

4. On a question by a creditor of A. of a fraudulent assertion by B., of ownership of goods levied on as A.'s, any statement made by B. in the absence of C., which are afterwards assented to by the latter, or were part of the *res gestæ*, are evidence: *Rea v. Missouri*, 532.

The extent to which a cross-examination, is carried not reviewable on error: *Ib.*

**FRAUD ON REVENUE.**

A device to avoid the revenue acts, and whose operation does avoid them, is subject to no legal censure if the device be carried out by means of legal forms: *United States v. Isham*, 496.

**FRAUDULENT CONVEYANCE.**

Under the statute of frauds of Missouri, a sale of household furniture in a house occupied jointly by vendor and vendee, both using the furniture alike, and there being no other change of possession than that the vendor, after going around with the vendee and looking at the furniture and agreeing on the price, turned it over to the vendee and executed a bill of sale before a notary, both parties then, after the sale, occupying the house and using the furniture exactly as before, is void as against the vendor's creditors: *Allen v. Massey*, 352.

**INFANT.**

Need not himself have been free from fault to entitle him to recover damages resulting from the fault of another: *Railroad Company v. Stout*, 657.

**INTEREST.**

Where allowed, not under contract, but by way of damages, the rate must be according to the *lex fori*: *Goddard v. Foster*, 124.

**LACHES.**

1. Where a bill is filed by a third party to set aside, as fraudulent, completed judicial proceedings, regular on their face, the bill being filed five years after the judicial proceeding, which it is sought to set aside, have been completed, the cause of so considerable a delay should be specifically set out. And if ignorance of the fraud is relied on to excuse the delay it should be shown specifically when knowledge of the fraud was first obtained: *Harwood v. Railroad Company*, 78.

2. A bill by *cestui que trusts* was dismissed where all the grounds of action had occurred between twenty and thirty years, and the alleged breach of trust had taken

place thirty-seven years before the bill was filed, and the trustee was dead. This although the *cestui que trusts* were women and the trustee a lawyer, who had married their half sister: *Hume v. Beale, Executrix*, 336.

**MANDAMUS.**

Against an officer of the government, in the absence of statutory provision to the contrary, abates on his death or retirement from office. His successor in office can not be brought in by way of amendment of the proceedings or on an order for the substitution of parties: *United States v. Bartwell*, 604.

**MASTER AND SERVANT.**

The rule that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury, whether a true rule or not, has no application when one of the persons employed and injured is a boy of tender years, employed as a helper under the superintendence of a full grown man of mature years, and required by the master to obey his orders: *Railroad Company v. Fort*, 553.

**NECESSARIES IN A FOREIGN PORT.**

1. Where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage and like services rendered to the vessel, the presumption of law, in the absence of fraud or collusion, is that they are made upon the credit of the vessel as well as upon that of her owners, and the presumption can be repelled only by proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry: *The Emily Souder*, 667.

2. Liens for such advances have priority over existing mortgages to creditors at home: *Ib.*

**NOTICE.**

1. Where inquiry is a duty, the party bound to make inquiry is affected with all the knowledge which he would have got had he inquired: *Cordova v. Hood*, 1.

2. Through newspapers not necessary to give effect to a proclamation of the President. It takes effect when signed and sealed with the seal of the United States, officially attested: *Lapeyer v. United States*, 191.

**OPINIONS OF THE COURT.**

May be assisted, in regard to an ancient transaction, by a judgment of another court, upon its sitting at the scene of the transaction, though such judgment be not capable of being pleaded as *res judicata*: *Hume v. Beales, Executrix*, 336.

**PATENT.**

1. Where a patentee has assigned his right to manufacture, sell, and use within a limited district an instrument, machine, or other manufactured product, a purchaser of such instrument or machine, when rightfully bought within the prescribed limits, acquires by such purchase the right to use it anywhere, without reference to other assignments of territorial rights by the same patentee: *Adams v. Burke*, 453.

2. Where a claim in a patent uses general terms of reference to the specifications,

such as "substantially in the manner and for the purpose herein set forth," although the patentee will not be held to the precise combination of all the parts described, yet his claim will be limited by reference to the history of the art, to what was really first invented by him: *Carlton v. Bokee*, 463.

#### RAILROAD TRAVEL.

An act of Congress passed in 1863, which gave certain privileges to a railroad corporation, enacted also, that "no person shall be excluded from the cars on account of color":

*Held*, that this meant that persons of color should travel in the same cars that the white ones did, and along with them in such cars: *Railroad Company v Brown*, 445.

#### REBELLION.

1. To a suit by the legatees to compel an executor to account for monies received by him from sales of property belonging to the estate of his testator, and to pay to them their distributive shares, it is no answer for the executor to shew that he invested such funds in the bonds of the Confederate government, by authority of a law of the State in which he was executor, and that such investment was approved by the decree of the Probate Court having settlement of the estate: *Horn v. Lockhart*, 571.

2. The acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are in general to be treated as valid and binding: *Ib.*

3. Judicial proceedings during the war of the rebellion, within the lines of the Federal army, by a private person on a mortgage, ending in a judgment and sale of mortgaged premises, against one who had been expelled by the military authority of the United States into the so-called Confederacy, and who had no power or right to return to his home during the rebellion:

*Held*, null, and a judgment which refused to vacate them reversed.

*Dean v. Nelson*, 10 Wallace, 172, affirmed: *Lasere v. Rochereau*, 437.

#### TAXES.

1. A party who has no title to lands can not acquire one by mere payment of taxes on them: *Homestead Company v. Valley Railroad*, 153.

2. A party by paying taxes which another party ought to pay, but does not pay, can not make such second party his debtor by having stepped in and paid the taxes for him, without being requested to do so: *Ib.*

#### USE AND OCCUPATION.

One who enters into possession of land in virtue of an agreement that he is to be a purchaser of it, can not be held liable for it, if the purchase is concluded: *Carpenter v. United States*, 489.

## SELECTED DIGEST OF STATE REPORTS.

[For the present number of the REVIEW selections have been made from the following State Reports: 47 Georgia, 10 Kansas, 108 Massachusetts, 35 New Jersey, 3 South Carolina (new series), and 21 Wisconsin.]

### ACTION.

1. A claim for money tortiously obtained from the claimant may be assigned to a third person, so as to give the assignee a right to recover the same in his own name:

*Stewart v. Balderston*, 10 Kan., 131.

2. The owner of a valid tax sale certificate, to whom a tax deed, fatally defective in form, has been issued, may compel the County Clerk, by mandamus, to execute to him a proper tax deed: *Clipinger v. Tuller* 10 *Ib.*, 377.

3. A note to be salable, so as to give the purchaser a right to enforce it for the full amount, must be available in the hands of the seller, and the test of its availability in the hands of the seller is his right to maintain an action on it against the maker at the time of the transfer, assuming it then to have been due: *Holcomb v. Wyckoff*, 35 N. J.

4. A note void in the hands of the payee, because obtained by him of the maker by fraud, is collectible in the hands of a subsequent *bona fide* holder who has taken it before maturity for value; but if such holder has paid on such transfer a less sum than the amount of the note, he can only recover the amount which he, or some prior holder through whom he derives title, has paid for it: *Ib.*

5. Where a contract is for the doing of two or more things which are entirely distinct, and one of them is prohibited by law, such illegality of the one stipulation can not be set up as a bar to an action for a breach of one of the valid stipulations: *Erie R. R. Co. v. Union L. & E. Co.*, *Ib.*, 240.

6. A railroad company agreed to give its bonds in consideration of certain monies to be paid in installments, and afterwards, by legislative authority, becoming amalgamated with two other companies, tendered the bonds of the consolidated incorporation, and brought suit for the money.

*Held*, that such suit would not lie, the consideration offered not being that agreed for: *N. J. M. R. Co. v. Strait*, *Ib.*, 322.

7. The plaintiff agreed to cultivate the defendant's land for two years for a share of the crop, both parties understanding that the crop would be larger in the second year than in the first. The defendant, at the end of the first year, paid the plaintiff his share of that year's crop, and refused to let him cultivate for the second year:

*Held*, that the plaintiff might maintain an action for work done and materials furnished in cultivating the land: *Williams v. Bemis*, 108 Mass. Reports, 91.

### ADMINISTRATOR.

Settlements with administrators and the orders founded thereon are in practice so much like *ex parte* proceedings, or proceedings *in rem*, that the least tincture of fraud on the part of the administrator in obtaining a settlement or order too favorable to himself should invalidate the same: *Shoemaker v. Brown*, 10 Kan., 383.

### ADMINISTRATORS AND EXECUTORS.

1. An executor can not, by a power of attorney not authorized by the will, transfer

the entire management of the estate which he represents to another, so as to bind creditors. Nor will such a power authorize the agent to sell any portion of the property which, in his discretion, he may deem to be for the interest of the estate, and thus divest the claims of creditors upon the property sold: *Neal et al. v. Patten et al.*, 47 Ga., 73.

2. The order of the Court of Ordinary granting leave to an administrator to sell the lands belonging to the estate he represents, is his authority for so doing. The authority being shown, the law presumes the Court of Ordinary required all the law requires to have been done before granting the order to sell, and we will not go behind that judgment: 4 Georgia, 154, Warner, J., delivering the opinion. The order to sell being a judgment of a court of competent jurisdiction, imports legally a necessity for the sale, and such judgment can not be attacked and set aside collaterally. It is not only leave to sell, but it is a judgment of the court that such sale will be for the benefit of the heirs and creditors of the estate. In favor of this judgment we are to presume the court did its duty: 7 Georgia, 562, Nisbet, J.: *Davie v. McDaniel*, *Ib.*, 195.

#### ADMISSIONS.

The declarations and admissions of a former owner of the property, made during the existence of his title, are competent evidence against a party who has derived title through such former owner: *Horner v. Stillwell*, 35 N. J., 307.

#### ADVERSE POSSESSION.

1. Occupancy for ten years of one of two adjoining parcels of land included within the lines of a plat held as color of title, held not to confer title by adverse possession against the owner of the other parcel: *Massey v. Duren*, 3 S. C., 34.

2. Title by adverse possession can not be acquired where no trespass is committed against the owner: *Ib.*

#### ALIMONY.

1. Alimony may be awarded to the wife upon granting to the husband a divorce for her fault: *Graves v. Graves*, 108 Mass., 814.

2. Upon an application to alter a decree for alimony, the court may take into consideration property acquired by the husband since the original decree, as well as the facts on which that decree was founded, and the circumstances of the separation of the parties: *Ib.*

#### AMENDMENTS.

Where a defendant has been regularly served by a summons, and there is a defect in the return of the officer respecting the service, the defect may at any time, even long after judgment, in furtherance of justice, be cured by amendment so as to make the return conform to the facts: *Kirkwood v. Reedy*, 10 Kan., 453.

#### AMERCEMENT.

1. When goods and chattels in the possession of a defendant in execution, are levied on by a sheriff, and he refuses and neglects to proceed to execute his writ by selling the property, at the request of the plaintiff, on the ground as set forth in his return to the writ that the goods are claimed by other parties, but asks no indemnity of the plaintiff, and takes no measures to secure himself against such claim, he will be liable to amercement: *Harris v. Kirkpatrick*, 35 N. J., 392.

2. A sheriff is not, by a levy and sale, estopped from denying the plaintiff's right to the proceeds of such sale, nor from showing that the property sold under plaintiff's sanction was not the defendant's, nor liable to such levy and sale: *Ib.*

### ARBITRAMENT AND AWARD.

1. To justify a court in setting aside an award on the ground of mistake, the mistake, whether of law or fact, must be gross and palpable. Mere error of judgment in the arbitrators is not a sufficient ground for setting aside the award: *Overly et al. v. Thrasher*, 47 Ga., 10.

2. Where three arbitrators are selected by the parties, and one, conceiving himself to have been selected as umpire, expressed no opinion on the points submitted, except where the others disagreed, but signs the award with the others, it is doubtful if the award can be set aside on this ground. Certainly the arbitrator can not be introduced as a witness to show his own misconduct in this respect, if it be misconduct. He stands upon the same footing with a juror called to impeach a verdict to which he has assented: *Ib.*

3. Where the award upon its face appears to be within the submission, it is not competent in a suit at law on the award to show by parol that the arbitrator exceeded his authority: *Ruckman v. Ransom*, 35 N. J., 565.

### ASSESSORS.

The assessment of certain personal property at only one-third its value, though illegally and improperly made, does not render all the taxes founded thereon void, nor does it authorize an injunction to restrain the collection of two-thirds of the taxes levied on monies, credits, and shares in national banks, which last mentioned property was assessed at its full value: *Adams v. Beman, Treasurer*, 10 Kan., 38, 46.

### ASSIGNMENTS.

1. An assignment for the benefit of creditors, giving the assignee power to sell the real estate "at such time, in such manner, and upon such terms as he may decree expedient and prudent," does not give the assignee power to bind the assigned estate by an express covenant of warranty, nor does such power exist by implication of law: *Welch v. Davis*, 3 S. C., 110.

2. A purchaser of real estate, from an assignee for the benefit of creditors with covenant of warranty, has no equity to subject the assigned estate to a claim arising from a breach of the covenant: *Ib.*

### ASSIGNEES.

An assignee for the benefit of creditors who purchases some of the debts at less than their nominal amounts, is not entitled to credits on his account with other creditors for the full amounts of the debts. He can only claim as disbursements what he actually paid: *Farrar v. Farley*, 3 S. C., 11.

### ATTACHMENT.

Where one is not a resident of this State, but is passing through the same with his goods, an attachment may issue against him, on the ground "that he is actually removing out of the county" in which he may then be found: *Johnson v. Lowery*, 47 Ga., 560.

### AUCTION.

1. An auctioneer may sue, in his own name, a purchaser at an auction sale, to recover his fees, when the conditions expressly stipulate that an auctioneer's fee, of a specified sum, shall be paid to the auctioneer on the day of sale, but his right to recover will depend on the validity of the contract to purchase, as between buyer and seller: *Johnson et al. v. Buck*, 35 N. J., 338.

2. Sales by auction are within the statute of frauds: *Ib.*

3. The signature of the purchaser to the conditions of sale made by the auctioneer's clerk, as the bids are publicly announced, is a sufficient signing within the statute of frauds: *Ib.*

4. To satisfy the statute, it is sufficient that the terms of the bargain may be gathered from two or more separate papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former; but the connection between the signed and unsigned papers can not be made by parol evidence that they were intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred: *Ib.*

5 Conditions of sale read before the biddings commenced, but not annexed to the catalogue on which the purchasers' names were entered, or referred to therein, can not be held to supply the terms of sale omitted from the catalogue: *Ib.*

#### AUTREFOIS ACQUIT OR CONVICT.

Although proof of one particular fact is necessary to a conviction under either of two statutes, yet if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either is no bar to the prosecution and punishment under the other: *Morey v. Commonwealth*, 108 Mass., 433.

#### BANKS AND BANKING.

Note indorsed in blank by the President of a New York bank, in his name of office, and transferred to the plaintiff, and a mortgage securing it assigned to him in writing by the same officer, under the seal of the corporation. The articles of association provided that no conveyance of real estate nor contract in relation thereto should be binding on the bank unless authorized by a vote of the Board of Directors. In an action on the note and mortgage:

*Held*, that as between the plaintiff and mortgagor the legal presumption must be that the President was authorized to execute the assignment, the bank itself not appearing or asserting title to said instruments: *Kennedy v. Knight and Wye*, 21 Wis., 345.

#### BANKS.

1. A bank incorporated for the benefit of the State, of which the State is the sole stockholder, and for whose debts the State is liable, has the same rights, and is subject to the same obligations, so far as creditors are concerned, as a bank whose stockholders are private individuals: *Dabney et al. v. Bank of S. C.*, 3 S. C., 124.

2. The assets of an insolvent bank are a trust fund for the payment of its creditors, whether as guaranties, bill holders, depositors, or otherwise, and if there is no lien on the fund, the distribution among the creditors must be *pari passu*, and until the creditors are fully satisfied there is nothing which the stockholder, whether a private individual or a sovereign State, has the right to dispose of or appropriate to his own use: *Ib.*

3. In the absence of a special contract varying the rights of the parties, depositors of Confederate currency in a bank are entitled to be paid in lawful money only so much as the currency was worth at the time of the deposit in such money: *Ib.*

4. The capital of an incorporated bank being a trust fund for the payment of its debts, if it be withdrawn by the stockholder, even though a sovereign State, is held, after such withdrawal, subject to the trust: *Ib.*

5. The office of a private banker is not a bank within the terms of a promissory note made payable "at any bank in Boston:" *Way v. Butterworth*, 108 Mass. 509.

6. A National bank has authority to buy the checks of individuals on other banks, whether payable to bearer or to order: *First National Bank v. Harris*. *Ib.* 514

**BANKRUPT.**

The liability of the drawee upon a bill of exchange accepted and dishonored by him, to an indorser who then pays it, is barred by a discharge of the drawee in bankruptcy proceedings begun after his dishonor of the bill, though before the payment by the indorser: *Hunt v. Taylor*, 108, Mass., 508.

2. A creditor, by proving his claim in a bankrupt proceeding, does not thereby, by force of the twenty-first section of the act of the United States relating to bankruptcy, destroy his right of action; the effect of such act being to merely suspend such right of action during the pendency of the proceedings. Under such circumstances, the proper course is to apply to the court where the action is pending to stay the proceedings: *Smith v. Soldiers' Business and Dispatch Co.*, 35 N. J., 50.

**BILL OF EXCEPTIONS.**

The judge before whom a case was tried may settle the bill of exceptions therein after his term has expired: *Hale v. Hazleton*, 21 Wis., 325.

**BROKER.**

In an action to recover a commission on a sale of a house to the defendant, there was evidence that the plaintiff, who was not a real estate broker, said to the defendant who was seeking a home, "If I find you a house you must pay me a commission," and the defendant replied "I would as soon pay you as any other person;" that the plaintiff did not see the defendant again; but that in consequence of information furnished by the defendant, a third person called on the plaintiff and sold him a house:

*Held*, that this evidence would support a verdict for the plaintiff, although the usage of brokers is, that in the absence of special agreement, the vendor and not the purchaser pays the commission, and although the plaintiff had not taken out an internal revenue license from the United States as a real estate agent: *Pope v. Beals*, 108 Mass., 561.

**CERTIORARI.**

1. Certiorari is the proper writ to bring up the final adjudication of special statutory tribunals, which act in a summary way, different from the course of the common law: *State, Elder, pros. v. District Medical Society*, 35 N. J., 200.

2. Such writ will not lie before judgment, in cases which can not be continued or completed in this court: *Ib.*

**CHECK.**

1. A person obtaining possession of a check by means of a forged indorsement, will not acquire any interest in it, although he was not aware of the forgery: *Buckley v. Second National Bank of Jersey City*, 35 N. J., 400.

2. That the forgery was committed by an agent of the plaintiff, does not change the rule where there is no fraud, or where no gross neglect is shown against the plaintiff: *Ib.*

3. A check on a bank in Boston was sent from Boston by mail to Rochester in New York, and there bought four days after its date, and was presented for payment two days afterwards:

*Held*, that the buyer was not subject to equities existing between the original parties, of which he had no notice, either on the ground that the lapse of time between the date of the check and his purchase of it should have put him upon inquiry, or on the ground of unreasonable delay in making presentment: *First National Bank v. Harris*, 108 Mass., 514.

## CITY.

In an action of tort against a city for entering the plaintiff's close and pulling up a post and preventing him from placing a building upon the close, the city answered that the close was a public street and the city rightfully entered upon and used it for the public. Just before the action was brought, the Mayor and the City Solicitor signed a written statement that the acts complained of were done by the city for the purpose alleged in the answer; and it was proved at the trial that the City Marshal did them by the Mayor's orders:

*Held*, that the statement of the Mayor and Solicitor did not bind the city, and that the city was not liable, whether the place in question was or was not a public street: *Haskell v. New Bedford*, 108 Mass., 208.

## COMMON CARRIER.

1. Where a railroad company, in this State, sells a through passenger ticket by a specified route to some point out of the State, over the lines of road belonging to other companies in other States, it seems that the undertaking of the first named company is to transport the passenger and his baggage safely to such place of destination, and that it is liable to him for any injury to his person or baggage occurring on any of said connected lines of road in violation of such undertaking. Downer, J., expresses no opinion on this point: *Candee v. Pa. R. R. Co.*, 21 Wis., 589.

2. A common carrier may contract that the owner of live stock shall assume all risk of damage from whatever cause, in course of transportation: *Bells v. Farmer's L. & G. Co.*, *Ib.*, 81.

3. Plaintiff's goods, carried by defendant, not being secured in cases or by any water-proof covering, were injured by rain in their transfer from the cars to defendant's wagon, and thence to its office:

*Held*, that defendant was liable for the damage: *Ib.*

## CONSIDERATION.

One not named as payee, who puts his name on the back of a note before delivery to the payee, will be held liable on it as an original promisor, if it be proved that he wrote his name on the note as surety for the maker, upon the faith of which money was loaned or credit given by the payee to the maker. His liability is that of a joint and several maker of the note. Forbearance of a precedent debt of the principal is a sufficient consideration for such undertaking, and though the payee afterwards indorses his name on the note and uses it for his own purposes for discount at a bank, he may, if compelled to take up the note, erase his own indorsement and recover of the other parties as makers, upon proof of the original contract under which the note was given: *Chaddock v. Vanness*, 35 N. J., 519.

## CONSOLIDATION OF RAILROADS.

Where, after an election has been held in a county which resulted in authorizing the commissioners to subscribe to the stock of a railroad corporation, and before such subscription has actually been made, such corporation, in pursuance of authority granted by general law in force at the time of the election, consolidated with another railroad corporation, the authority to make any subscription is terminated; an attempted subscription by the commissioners to the stock of the new and consolidated corporation is *ultra vires*, and does not bind the county: *St. Joe & D. C. R. R. Co. v. Commissioners of Nemaha*, 10 Kans., 569.

## CONSTITUTIONAL LAW.

1. In general, where parties to an action have had their rights determined by a final judgment, the controversy being closed under existing laws, a subsequent act of the Legislature granting a new trial would be void: *Calkins et al. v. State*, 21 Wis., 506.

2. But when such final judgment is in favor of the State, it may, by legislative act, waive the benefit of such judgment, and authorize the granting of a new trial on application of the adverse party: *Ib.*

#### CONSTRUCTION OF STATUTES.

A liberal construction must be given to all tax laws for public purposes: *State, Paulson, proa. v. Taylor*, 35 N. J., 184.

#### CONTINUANCES.

A trial at an adjourned term of a case which has been continued by consent to the next term, is irregular, and a judgment rendered therein will be reversed on error: *Sawyer v. Bryson*, 10 Kans., 199.

#### CONTRACT.

1. Where L. being empowered only to sell the lands of A. and B., in the city of P., agreed to sell V. said lands, and also, other lands of A. and B., in G. County, for one entire consideration, and executed and delivered to V., in the name of his principals, a deed of the lands in P., and at the same time (by a written instrument executed by both himself and V.,) agreed to procure the G. County lands, to be deeded to V., by a specified time, or that their value should be paid by him as stipulated damages, or deducted from the purchase money, and thereupon V. executed his bonds secured by mortgage, for the purchase money, and delivered them to L., as such agent, but the G. County lands were never so deeded:

*Held* (1), that these facts show an absolute, and not a conditional, delivery of the bonds and mortgage; (2), that they do not show the bonds and mortgage to be invalid; (3) that the non-conveyance of the G. County lands might be set up in defense to a foreclosure of the mortgage as a partial failure of the consideration: *Akerly v. Vilas et al.*, 21 Wis., 89.

2. Said deed also purported to convey the grantor's shares in certain land companies, owning land in P., and L. agreed at the time of the sale to send the grantee, duly assigned, all the certificates of shares in said companies in the grantor's possession, but they refused to make such assignment and transfer:

*Held*, that the deed was effectual to convey all the equitable interest of the grantor's in the lands of said companies, and the failure to assign and transfer the certificates could not be set up to show a partial failure of the consideration for the bonds and mortgage: *Ib.*

3. H. offered to pay D. \$100, if D. would find him a purchaser for his farm at a certain price:

*Held*, that before learning that D. had acted upon the offer and secured a purchaser, H. might himself sell the farm without becoming liable to D.: *Darrow v. Harlow*: *Ib.*, 306.

4. In August, 1864, A. made a verbal agreement with B. to serve him as overseer during the year 1865, for sixteen bales of cotton, weighing four hundred pounds each, to be delivered by B. to A. on the 1st of January, 1866. A. performed the agreement, and B. refused to deliver the cotton:

*Held*, that, although the agreement was within the statute of frauds, A. was entitled to recover from B. the value of the sixteen bales of cotton, the law implying a promise, at the completion of the services, to deliver them according to the terms of the original agreement: *Carter v. Brown*, 3 S. C., 298.

#### CORPORATIONS—MUNICIPAL.

Where a municipal corporation is charged by law with the duty of keeping in re-

pair the streets and sidewalks within the corporate limits, want of ordinary care is the true measure of its liability, when it is charged with having caused the death of a foot passenger by its negligence in not keeping in repair a cellar door forming part of the surface of a sidewalk: *Johnston v. Charleston*, 3 S. C., 232.

#### COUNTER CLAIM.

In an action by A. against B., a debt due to B. by a partnership of which A. was a member, can not be sustained as a counter claim, and the objection may be taken at the trial, though there was no demurrer to the counter claim as pleaded: *Byrd v. Charles*, 3 S. C., 352.

#### COVENANT.

The owner of a farm conveyed a strip of it, between four and five rods wide, to a railroad corporation by a deed containing this clause: I hereby covenant that I and my heirs and assigns will make and maintain a sufficient fence through the whole length of that part of the railroad which runs through my farm; this covenant of maintaining the fence to be perpetual and obligatory upon me and all persons who shall become owners of the land on each side of said railroad:

*Held* (1), that this covenant gave the grantee an interest in the nature of an easement in the adjoining land of the grantor and ran with that land, and constituted an incumbrance, within the meaning of the covenant against incumbrances in a subsequent deed thereof; (2) that the obligation to maintain the fence was not impaired by the omission to perform it for twenty years, without any evidence of its having been released or extinguished; (3) that an action for a breach of the covenant against incumbrances in the second deed, was not barred by the statute of limitations until twenty years after the date of that deed; (4) that the fence was to be maintained on each side of the railroad and wholly on the land retained by the grantor in the first deed; (5) that the measure of damages for a breach of the covenant against incumbrances was a just compensation for the real injury resulting from the incumbrance to be estimated by the difference in the fair market value of the estate by reason of the existence of the incumbrance, and taking into consideration the cost of fencing so far only as it exceeded the cost of any fences which the situation and circumstances of the estate would otherwise have required the maintenance of: *Bronson v. Coffin*, 108 Mass., 175.

#### DAMAGES.

1. The measure of damage for any illegal overflow of lands is the actual damage coming to the land by such illegal overflow: *Phinizy v. City Council of Augusta*, 47 Ga., 260.

2. Where a purchaser of grain, to be delivered on the seller's premises, refused to perform the contract, the measure of damages for the breach held to be, not the difference between the contract price and that at which the grain was finally sold, but rather the difference between such contract price and what might have been obtained for it if sold within a reasonable time after the breach: *Pickering v. Bardwell*, 21 Wis., 569.

3. The rule is now firmly established, that when the owner of lands undertakes to do a work which, in the ordinary mode of doing it, is a nuisance, he is liable for any injury which may result from it to third persons, though the work is done by a contractor exercising an independent employment, and employing his own servants; but when the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants, in the manner of executing it, the contractor

alone is liable, unless the owner is in default in employing an unskillful or improper person as the contractor: *Cuff's Adm'r v. Newark and New York R. R. Co.*, 35 N. J., 17.

4. The principle upon which the superior, who has contracted with another, exercising an independent employment for the doing of the work, is exempt from liability for the negligence of the latter in the execution of it, applies as between the contractor and his sub-contractor: *Ib.*

5. Damages to be recovered must be both the natural and proximate consequence arising from the wrong complained of, and not from the wrongful act of a third party remotely induced thereby: *Ib.*

6. The intervention of the independent act of a third person between the wrong complained of, and the injury sustained, which act was the immediate cause of the injury, is made a test of that remoteness of damage which forbids its recovery: *Ib.*

#### DEBTOR AND CREDITOR.

Where the drawee of a promissory note requests a third person to take up the note, promising, if he will do so, to pay him the amount due thereon, a new debt between such third person and the drawer for the full amount of the note is created by the fact of the former's taking it up, although he pays for it much less than such amount: *Boyce v. Shiver*, 3 S. C., 515.

#### DEDICATION.

Where a stranger performs acts in reference to land which would amount to a dedication of it to a public use, in case he were the owner, he is not bound by those acts upon subsequently acquiring the land: *Bushnell v. Scott*, 21 Wis. 457.

#### DEED.

1. A grantor can not deliver a deed to the grantee or his attorney as an *escrow*. Such a delivery would be equivalent to adding a parol condition to the instrument. To make the deed an *escrow*, it should be delivered to a third person, to be by him delivered to the grantee upon the performance of any required condition: *Duncan, Adm'r, et al. v. Pope*, 47 Ga., 445.

2. Where the equity of redemption in mortgaged premises is conveyed to the mortgagee, the estate of the mortgager under the mortgage will not merge, but will be kept alive in order to enable him to defend under it as against the title of another acquired intermediate the taking of the mortgage, and the conveyance to him of the equity of redemption, if such appears to be the intention of the parties in making the conveyance, and the justice of the case is thereby subserved: *Mulford v. Peterson*, 35 N. J., 127.

3. Where a person takes a deed of another's lands, with intent to defraud the creditors of the latter, and afterwards, in pursuance of the same fraudulent arrangement, procures the assignment of a prior outstanding valid mortgage with the grantor's money, neither the deed nor the mortgage will be available as a defense in ejectment by one deriving title under a judgment and execution against the grantor: *Ib.*

4. A sum named in an agreement containing disconnected stipulations of various degrees of importance, will be considered as a penalty, though it is called in the agreement liquidated damages, unless the agreement specifies the particular stipulation or stipulations to which the liquidated damages are to be confined: *Whitfield v. Levy*, 35 N. J., 149.

5. Where some of the stipulations are such that the damages arising from the breach may be ascertained by legal computation, and others are not, a sum named to be paid in gross for non-performance will be held to be a penalty. To be considered liquidated as to any, it must be susceptible of being regarded as liquidated as to all the provisions to which it extends. It can not be liquidated as to those breaches which in their nature are uncertain, leaving those which are certain to a distinct remedy by the verdict of a jury: *Ib.*

6. Where the language of a deed admits of but one construction, and the location of the premises intended to be conveyed is clearly ascertained by a sufficient description in the deed by courses, distances, or monuments, it can not be controlled by any different exposition derived from the acts of the parties; but where the language is equivocal, and the location of the premises is made doubtful, either by the insufficiency of the description, or the inconsistency of two or more parts of the description, the construction put upon the deed by the parties in locating the premises, may be resorted to aid in ascertaining their intention: *Jackson v. Perrine*, 35 N. J., 137.

7. Where an ambiguity exists in the location of a lot, from inconsistent calls, the acts of the grantor in making the survey and marking a boundary by stakes, which is consistent with one call for a boundary and not with another, when coupled with evidence of an acceptance by the grantee of such location, by setting his fences by the stakes, are competent evidence of a practical location by mutual consent, which, when once made, will be conclusive upon both parties, especially when, by such location, the grantee obtains his full complement of land, and the courses and distances set out in the deed are fully answered, and the rights of a subsequent purchaser from the same grantor of an adjoining lot have intervened: *Ib.*

8. A monument in a line gives greater certainty in the location of that line than can be obtained by measurements from an external monument to a beginning corner; and where the premises can not be located in conformity with both, the latter must yield to the former: *Ib.*

9. If the description of a close intended to be conveyed, includes a number of particulars, all of which are essential to ascertain its identity, no estate will pass except such as will agree with every part of the description; but if the tract intended to be conveyed is indicated with reasonable certainty, it will pass by the conveyance, that the intent of the parties may prevail, although in some respects the description is erroneous: *McLaughlin v. Bishop*, 35 N. J., 512.

#### DEVISE AND LEGACY.

A residuary devise and bequest to the testator's wife, "to her own use and to be disposed of at her decease, according to the terms of any will that she may leave," vests the whole of the residue in her absolutely; and in a subsequent clause, that "she is, of course, to charge herself with the education and support of our daughters, so long as they shall remain unmarried," raises no trust or charge upon the property: *Spooner v. Lovejoy*, 108 Mass., 529.

#### DRAFT.

1. The decision of this court in *re Griner*, 16 Wis., 423, that the Act of Congress of 1795 and 1862, providing for calling forth the militia of the United States, are valid; that the President has the authority under the Act of 1795 to detach and draft the militia without the aid of State legislation; and that under the Act of 1862, he could exercise the authority so conferred in a State which had no law on the subject of drafting, reaffirmed: *Druecker v. Salomon*, 21 Wis., 628.

2. Persons who conspired to resist and did forcibly resist the execution of the draft, were guilty of "levying war" against the United States; and those who were engaged in the conspiracy, performing any part therein, however minute, were guilty of the crime, though not personally present at the immediate scene of violence: *Ib.*

#### EJECTMENT.

The owner of land dedicated for a public street, may maintain ejectment against a railroad company permanently occupying any part of the same for its roadway: *Weisbrod v. Ch. and N.-W. Railway Co.*, 21 Wis., 609.

#### EMINENT DOMAIN.

The omission to make due compensation for private property or rights appropriated by authority of the Legislature to the public use, can be taken advantage of by the owner only, and if he once assents to the taking, can not afterwards be availed of by himself or those claiming under him: *Haskell v. New Bedford*, 108 Mass., 208.

#### EQUITY.

1. In an action for specific performance of an agreement for a lease, equity will not generally decree damages for breaches of covenants which should be included in such lease: *Newman v. Orton*, 21 Wis., 287.

2. In decreeing the execution of the lease, the court may direct it to be dated anterior to the alleged breaches, so as to give an action at law for them: *Ib.*

3. But if the statute of limitations have run upon the breaches, it seems that the court can not compel a defendant to enter into an undertaking not to avail himself of the statute in a subsequent action at law: *Ib.*

4. A court of equity and a court of law having concurrent jurisdiction, the court first taking jurisdiction will retain it: *Hall et al. v. English*, 47 Ga., 511.

#### ESTOPPEL.

The doctrine that a party is estopped from contradicting the recitals of his own deed, is applicable only where the deed, as the act of such party, is admitted: *Hudson v. Inhabitants of Winslow*, 35 N. J., 437.

#### EVIDENCE.

1. On an issue whether the signature of a will is genuine, the subscription of a letter received through the mail by a witness, purporting to be signed by the testator in reply to a letter addressed by the witness to him, is inadmissible for a standard of comparison, without further proof of its authenticity: *McKeone v. Barnes*, 108 Mass., 344.

2. The decision in *Boorman v. Am. Express Co.*, that the possession by the owner of goods shipped, of the receipt of a railroad or express company, containing conditions restricting its liability as a common carrier, is only *prima facie* evidence that the owner assented to such conditions, and may be contradicted by parol evidence of facts and circumstances attending its receipt, adhered to and followed: *Strohn et al. v. Detroit & Mil. Railway Co.*, 21 Wis., 562.

3. The law presumes that a policy of insurance is based upon the application, and in a suit on such policy it is not error to reject the testimony of the officers of the company that the policy was issued on the belief that the statements in the application were true, and would not have been issued if any of them had been known to be untrue: *Washington Life Insurance Company v. Harvey*, 10 Kans., 525.

4. There is some conflict between the authorities as to how far a party may rely upon absence from the State of a written instrument as a basis for secondary evidence of its contents. But the question as to how it happens to be in another State may become material: *Shaw v. Mason*, 10 Kans., 189.

#### EXECUTION.

A return that the officer received the writ at 4 o'clock P. M., that he could find no goods and chattels, and for want thereof, at 4 o'clock P. M., of same day levied on certain real estate, will not vitiate the levy, as showing that he could not have made any search for personal property for want of time: *Treptow v. Buss*, *Ib.*, 170.

#### EXECUTORS AND ADMINISTRATORS.

1. The father of a store-keeper, who died insolvent and intestate, leaving a stock of goods in his store, took possession of the store, and, for a year and upwards, sold the goods at retail, and during this period replenished the stock with other goods purchased with his own money. He then administered on the estate, and by leave of the Ordinary, sold all the goods on hand at public sale. Under a creditor's bill to settle up the estate, in which the account was taken as in cases of regular administration:

*Held*, (1). That the administrator was not entitled to credit for the sum advanced by him in the purchase of goods; (2), that he had not, by reason of a supposed confusion of goods, forfeited all right to compensation for such advance; and (3), that he should be allowed to show what benefit the estate derived therefrom, and be allowed credit on his account for the amount of such benefit: *McKee v. Mobley*, 3 S. C. 242.

2. Where the estate of a decedent becomes insolvent after his death, the general assets can not be longer applied to the maintenance of the family: *Hinton v. Kennedy*, *Ib.*, 459.

3. Where the administrator of an entirely solvent estate pays simple contract creditors out of their order, reserving ample funds for the payment of specialty creditors, equity will relieve him from the legal consequences of the technical *devastavit*, if his conduct in making the payments was prudent and judicious; nor will he be charged because of the loss of the reserved assets, if no blame on account of such loss can be imputed to him: *Ib.*

#### EXEMPTION.

Where personal property, otherwise exempt from execution, has been pledged as collateral security for the payment of a debt, and judgment has been rendered on the debt, an execution may be issued and the property seized and sold thereon as in other cases: *Jones v. Scott*, 10 Kans., 33.

#### FIXTURES.

1. Where E. & Co. built a steam engine for the mill of K., and while it was still at their shop took a chattel mortgage on it, with a stipulation of their right to take possession of the same, whether it was affixed to the freehold or not, the intention of the parties, as evinced by the chattel mortgage, may be looked to as controlling in the determination of the character of the property, and as showing that it remained personal property: *Eaves v. Ester*, 10 Kans. 314.

2. If a tenant at will of land removes a substantially constructed building from another place and puts it on the land, upon stone foundations, with a cellar under it, as and for a permanent dwelling-house, without the consent of the landowner, or any contract with him, express or implied, that the tenant shall hold it as personal property, it becomes part of the realty and can not afterwards become personal

property by the mere assent of the landowner, without an actual severance of it from the land: *Madigan v. McCarty*, 108 Mass. 376.

#### FOREIGN JUDGMENT.

A record of a judgment rendered in Connecticut, properly authenticated under the act of Congress of May 26, 1790, by having the proper certificates and signatures of the clerk and Judge, and the seal of the Court appended thereto, will be presumed *prima facie* to be valid and binding, and entitled to full faith and credit in Connecticut and elsewhere, although the judgment may not be signed by the Judge of the Court rendering it: *French v. Pease*, 10 Kans. 51.

#### FRAUD.

In the case of a partner paying his own separate debt out of the partnership funds, it is manifest that it is a violation of his duty, and of the rights of his partners, unless they have assented to it. The act is an illegal conversion of the funds, and the separate creditor can have no better title to the funds than his debtor himself: *Williams v. Barnett*, 10 Kans. 461.

#### HIGHWAYS.

Where the County Commissioners of a county vacate a county road the county is not liable in damages to any person for losses or injuries sustained in consequence thereof: *Commissioners of Coffee Co. v. Vernard*, 10 Kans., 95.

#### HUSBAND AND WIFE.

1. A husband or a wife, in a suit in which neither is a party, can be asked a question for the purpose of disgracing or discrediting the testimony of the other, when the matter inquired into is not an indictable offense: *Ware v. Ware*, 35 N. J., 553.

2. A husband may maintain an action as holder upon a bill of exchange, payable to his wife or order, and indorsed by her and others, the last indorsement being in blank: *Ahrens v. State Bank*, 3 S. C., 401.

#### INJUNCTION.

1. It would require a very strong case to authorize the Supreme Court to control and set aside the judgment of the Chancellor granting or refusing an injunction: *Oberhalser & Keefer et al. v. Greenfield et al.*, 47 Ga. 530.

2. The general rule that equity will not restrain the sale of personal property for illegal taxes, adhered to in the case of a threatened levy upon the rolling stock of a railroad company: *Ch. & N. W. Railway Co. v. Borough of Ft. Howard*, 21 Wis., 45.

3. Such rolling stock though declared by section 34, ch. 79, R. S., to be a fixture, is such only for the purposes contemplated in that section, and is liable to seizure and sale for delinquent taxes, as personal property: *Ib.*

#### INSURANCE.

1. In case of a stipulation in a policy of insurance, that in the event of the building insured being used for certain specified hazardous purposes, the policy shall, for the time being, be suspended; and it being shown that such stipulation was being violated at the time of the fire:

*Held*, that it was no defense that it appeared that the agent of the company who procured the policy was cognizant of such use at the time the policy was taken out: *Dewees v. Manhattan Ins. Co.*, 35 N. J., 366.

2. The written agreement can not be controlled by parol evidence to the effect that a different understanding existed: *Ib.*

3. The doctrine of estoppel, resting on parol proof, is not applicable so as to vary the legal force of written instruments: *Ib.*

4. A policy of insurance contained a provision that the company should not be liable until the premium should be actually paid to the company; the policy also contained a receipt for the premium:

*Held*, that the company were estopped from setting up the non-payment of the premium for the purpose of avoiding the instrument: *Basch v. Humboldt Mutual Fire and Marine Ins. Co.*, 35 N. J., 429.

5. The underwriter can not make defense on the ground of the insufficiency of the preliminary proofs of loss, such proofs having been received without objection, and the refusal to pay having been put on the ground that the policy never went into effect: *Ib.*

6. If the underwriter means to insist on formal defects in the preliminary proofs, it would seem that he must apprise the assured of such objection, or must put his refusal to pay on that ground: *Ib.*

#### JUDICIAL SALES.

1. A sale of real estate of infants was made by a Master, at public auction, in June, 1862, under a decree which gave no direction as to advertising. It was advertised in a newspaper for a period less than one week before it was made:

*Held*, that the sale was not irregular and void: *Bulow v. Wille*, 8 S. C., 308.

2. A sale in June, 1862, by a Master in Equity, was not irregular because the decree for sale made in March, 1859, and renewed in March and November, 1860, had not been renewed within a year and a day before the sale: *Ib.*

#### JURISDICTION.

1. A Circuit Court of the United States has no jurisdiction of a case unless each of the parties is competent to sue, or liable to be sued in that court: *Robb & Lowndes v. Parker*, 3 S. C., 60.

2. The Circuit Court of the United States for the District of South Carolina has no jurisdiction of an action against a citizen of Michigan, brought by two plaintiffs, one of whom is a citizen of New York, and it makes no difference that the other plaintiff is a citizen of South Carolina: *Ib.*

#### LEASES.

1. A. being seized in fee of a tract of land, in consideration of \$2,000 granted to B. "the right and privilege of entering in or upon, by himself or his agents, all or any part" of said tract, "for the purpose of searching for minerals and fossil substances, conducting mining operations to any extent" he "may deem advisable, and for working, removing, selling and appropriating" to his own use, "for the term of ten years from," &c., "all phosphates that may be found on, by any person or persons, or contained in, any part" of said tract; provided that B. "shall not, at any one time during" said term, "engage in working over one-third part" of said tract; such one-third part to be selected by him as often as he may desire. The deed also contained grants to B. of the right to cut and remove trees and wood—such trees and wood to remain the property of A.—and of a general right of way, with the privilege of constructing railroads and other roads, and machinery, to be used in the transportation, manufacture, &c., of said substances, with the right to remove the same at the expiration of the term:

*Held*, that this was a demise of the phosphate beds for the term of ten years, with the exclusive right of raising, selling, disposing of and manufacturing all phosphates

found during the term, and that B. had the right to divide his interest and convey part of it to others: *Massot v. Moses*, 3 S. C., 168.

2. The expression "that may be found by any person or persons, or contained in any part" of the land, distinguishes this case from Lord Mountjoy's (Co. Litt., 165), and shows an intent to convey an exclusive right, and not one in common merely with the grantor; and this construction is aided by the fact that the consideration was an entire sum demandable at the delivery of the deed, and intended as compensation for the right granted: *Ib.*

3. The principal cases on the subject reviewed, and the principles deducible from them stated: *Ib.*

4. Unopened veins or beds of minerals contained in and below the surface of the soil may be demised as if they were separate pieces of land: *Ib.*

#### LIEN.

1. The vendor of real estate, who has executed only a title bond to convey, holds a lien for the unpaid purchase money: *Simpson v. Munde*, 3 Kans., 172, considered, and distinguished: *Stevens v. Chadwick*, 10 Kans., 406.

2. An indorsement of a note given for such unpaid purchase money transfers the vendor's lien: *Ib.*

#### LIMITATION OF ACTIONS.

1. A mortgage given to secure a note, though without any express covenant to pay the debt, may be foreclosed after the note is barred: *Whipple v. Barnes*, 21 Wis., 332.

2. Same point: *Knox v. Galligan*, *Ib.*, 476.

#### LIMITATIONS—STATUTE OF.

Mere delay by a creditor to sue the principal debtor until the bar of the statute of limitations has attached, as between them, does not discharge the security if he has been sued in time. The surety is not damaged by the delay, since, if he has to pay the debt, he can recover from the principal in the implied contract to hold him harmless, and the right to sue does not exist in this implied contract until the money be in fact paid by the security: *Reid et al. v. Flippin*, 47 Ga., 273.

#### MANDAMUS.

1. Mandamus will not lie at the instance of a private citizen to compel the performance of a purely public duty: *Bobbett v. Drescher*, 10 Kans., 9.

2. Where a private citizen sues out a mandamus he must show an interest specific and peculiar in himself, and not one that he shares with the community in general: *Ib.* 9, 331.

3. No private person or number of persons can assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts, simply because such private persons may be tax-payers or citizens of the county: *Bridge Co. v. Comm'rs of Wyandott Co.*, 10 Kans., 331.

#### MASTER AND SERVANT.

A master is responsible in a civil action for the tortious act of his servant, committed in the course of the latter's employment, and it makes no difference that the act was done wilfully and without the knowledge of the master, or even in disobedience of his orders: *Redding v. South Carolina R. R. Co.*, 3 S. C., 1.

#### MINOR.

The right of a parent to recover, in case of physical injuries to a minor child, is

founded solely upon the assumption that such injury has wrought a pecuniary loss to the parent, and is not affected by the extent of the pain and suffering of the child: *Sawyer v. Sauer*, 10 Kans., 519.

#### MORTGAGE.

1. A., on becoming bound for B.'s debt to C., took a mortgage from B. as security. Plaintiff paid a part of the debt, without any agreement with A. as to the assignment of the mortgage to him.

*Held*, that the lien of the mortgage could not be revived as to such part by a subsequent assignment to plaintiff: *Pelton v. Knapp*, 21 Wis., 64.

2. Plaintiff furnished money to B., with which he was to go to the places of residence of A. and C., pay the last installment of the debt, and take an assignment of the mortgage. B. paid the money to C., and several days after obtained the assignment:

*Held*, that the plaintiff could enforce the mortgage lien for said last payment, as against parties claiming under a lien subsequent to the mortgage, but prior to its assignment: *Ib.* *Downer, J.*, dissents.

3. A recorded deed of land, absolute on its face, with an unrecorded contract executed at the same time, for a reconveyance on repayment of moneys loaned:

*Held*, to be a legal mortgage: *Yates v. Yates, Ib.*, 479.

4. In consideration of subsistence furnished by J. S. to a husband and his family, and of his promise to provide for the husband's support in the future, the husband and his wife, who were jointly seized of a parcel of land subject to a mortgage, orally agreed to convey to J. S. what all the parties supposed to be the husband's undivided half thereof. In pursuance of this agreement, the husband executed to J. S. a deed purporting to convey an undivided half of the land to him, and the wife joined therein in token of release of her rights of dower and homestead, and thereafter J. S. furnished the husband with subsistence, which he shared with his family. The mortgagee entered to foreclose the mortgage; and within three years afterwards J. S. filed a bill in equity to redeem the land, and joined the husband and wife with the mortgagee as defendants. Pending the suit the husband died, and the wife filed a cross bill, more than three years after the entry of the mortgagee, against him and J. S., to assert her own right to redeem the whole of the land:

*Held*, that J. S. had no right or title against the wife in any part of the land, either directly or by estoppel; and that she was entitled to redeem it from the mortgagee upon paying the amount due thereon, without repaying the sum spent by J. S. in fulfilling his agreement with her and husband: *Pierce v. Chase*, 108 Mass., 254.

#### MUNICIPAL TAXES.

Under an ordinance to raise supplies, taxes were assessed upon plaintiff's property by a municipal corporation, and the Treasurer of the corporation being about to enforce payment under the provisions of a general ordinance requiring all taxes to be "paid in specie, or in the notes of specie-paying banks," plaintiff offered as payment a debt, of equal amount with the taxes, due him by the corporation:

*Held*, that the plaintiff had no right, legal or equitable, to compel the corporation to receive the debt as payment or satisfaction of the taxes, or as a counter claim under the Code of Procedure, or as a set-off or discount: *Trenholm v. Charleston*, 3 S. C., 347.

#### NEGLIGENCE.

1. When a stage coach proprietor employs a known drunkard as a driver, through

whose negligence, while intoxicated, a passenger receives injury, it is not error to instruct the jury that they may give exemplary damages: *Sawyer v. Sauer*, 10 Kans., 466.

2. The employment of a known drunkard, and entrusting to his care the lives and limbs of passengers, is the grossest of negligence. The traveling community have a right to expect that the drivers of coaches, like the engineers of locomotives, are men not only competent, but of sobriety; and whenever a known drunkard is placed in such positions of trust, the party so placing him should pay smartly for such reckless indifference to human life: *Ib.*, 470.

#### NOVATION.

When goods are consigned to a partnership for sale, and after the consignment and whilst the goods are still on hand, a dormant partner retires, and subsequently the consignor makes a new contract with the head of the old firm, of such a character as amounts to a novation of the consignment, the retiring dormant partner is not liable, even though he gives no notice of his withdrawal, unless it appear that the consignor had knowledge that he was a partner: *Phillips v. Nash*, 47 Ga., 218.

#### NUISANCE.

One is not guilty of a public nuisance unless the injurious consequences complained of are the natural, direct and proximate cause of his own acts. If such consequences are caused by the acts of others so operating on his acts as to produce the injurious consequences, then he is not liable: *State v. Rankin*, 3 S. C., 438.

#### OFFICER.

On the trial of an indictment for assaulting a police officer, evidence that the person assaulted was with the defendant's knowledge wearing the uniform and badge of a police officer and acting as such at the time of the assault, is sufficient proof that he was a police officer: *Commonwealth v. Tobin*, 108 Mass., 426.

#### PARENT AND CHILD.

Where a father permits his son to enter upon the father's land and put valuable improvements thereon, and by long possession to acquire title, he has no right, as against the son or his estate, to payment of the value of the land as it stood when the son took possession: *McKee v. Mobley*, 3 S. C., 242.

#### PLEADING.

An allegation in the complaint, that the judgment was rendered by "the Circuit Court of Kent county, Michigan,"

*Held*, a sufficient averment that it was rendered by a court of general jurisdiction; such being the general character of the Circuit Courts in the States of this Union. *Downer, J.*, dissents: *Jarvis v. Robinson*, 21 Wis., 530.

#### POWERS.

1. A power contained in a deed of marriage settlement, authorizing the trustees to sell or exchange, and re-invest, on the written request of *baron* and *feme*, or the survivor, and hold the proceeds, &c., "to the same uses, trusts, intents and purposes, and subject to the same declarations and limitations," as are set forth in the deed, is not exhausted by a sale of the original corpus, but attaches upon the proceeds, and the property purchased therewith: *Creighton v. Pringle*, 3 S. C., 77.

2. Where a power authorizing the sale of trust property, or the investment of trust funds, requires the observance of certain formalities, as, for instance, the *written request* of a *cestui que trust*, the formality must be strictly observed: *Ib.*

#### PRACTICE IN THE SUPERIOR COURT.

Where there was a suit pending in one of the superior courts of this State, against a citizen of this State and citizens of another State, and the non-resident moved an order removing the cause as to him to the Circuit Court of the United States, and the Circuit Court refused to take jurisdiction of the case:

*Held*, that the jurisdiction of the Superior Court of this State was not divested, and it was not error in the judge to re-instate the case on the docket: *Thacher & Co. v. McWilliams & Co.*, 47 Ga., 306.

#### PRINCIPAL AND AGENT.

There is a strong presumption of law against any credit having been given to a public agent acting within the scope of his authority; and if, in a case where he acted beyond his authority the defect of the authority was known to the other party, it seems that the same presumption lies against the liability: *McCurdy v. Rogers*, 21 Wis., 199.

#### PROCESS.

Process regular on its face, issued from a court having jurisdiction of the subject-matter, protects an officer in executing it; but the plaintiff in the proceedings is not protected by the regularity of the process; he must show a regular and valid judgment: *Allen & Barton v. Carlew*, 10 Kans., 70.

#### PROMISSORY NOTE.

1. The fact that a promissory note, the principal of which is payable in four years with interest annually, bears no indorsement of the receipt of either of three installments of interest which have fallen due, does not of itself render the note subject, in the hands of a third person who then took it as collateral security, to equities existing between the original parties to it: but is a circumstance for the consideration of the jury, on the issue whether he took it in good faith and without notice of such defenses: *National Bank of North America v. Kirby*, 108 Mass., 497.

2. The mere signature of a third person on the back of a negotiable note before its indorsement by the payee creates, *per se*, no implied or commercial contract whatever. The liability of such third person will be that of a second indorser, or of surety for the maker, according to the intention with which he became a party to the note, and parol evidence is competent for the purpose of showing what such intention was: *Choddock v. Vanness*, 35 N. J., 517.

3. The admissibility of parol evidence in relation to commercial paper, considered *per Depue, J.*: *Ib.*

#### RAILROAD.

A railroad corporation in consideration of the payment to them by a person of a certain sum of money per year in quarterly installments, and of his agreement to supply the passengers on one of their trains with iced water, issued season tickets to him quarterly for his passage on any of their regular trains, and permitted him to sell popped corn on all their trains:

*Held*, that his relation to them while traveling upon the railroad under this contract was that of a passenger and not of a servant: *Commonwealth v. Vermont and Massachusetts Railroad Co.*, 108 Mass., 7.

RELIGIOUS SOCIETIES.

A dwelling-house in Lawrence, owned by the diocese of the Episcopal Church, and used by the Bishop exclusively as a residence, is not exempt from taxation under §1 of Art. II. of the Constitution: *Vail v. Beach*, 10 Kans., 214.

SALE.

1. A sale of fish hereafter to be caught in the sea, does not pass title to the fish when caught: *Low v. Pew*, 108 Mass., 347.

2. The owner of a lot of wool stored in his factory, sold it in good faith and for value to a buyer who purchased on his previous knowledge and examination of the lot, and to sell again; agreed to keep the wool for awhile where it was, on storage for the buyer, who had no place of his own to store it in; received the buyer's direction to furnish him with samples of the wool to resell it by; opened some of the bales, took samples out of them and sewed them up again; and then delivered the samples to the buyer, together with a bill of parcels, specifying the numbers, marks and weights of the bales, and acknowledging receipt of the contract price:

*Held*, there was evidence for the jury of a delivery of the wool as against a subsequent attaching creditor of the seller: *Ingalls v. Herrick*, 108 Mass., 351.

SEWER.

A city authorized by statute to lay out common sewers through any streets, or private lands, may construct them so as to discharge into tide water, but has no right to discharge mud and filth through such a sewer in such quantities as to create a nuisance; and if the city, by such a discharge into a private dock, fills it up and obstructs its use by the owner as he has previously used it for receiving vessels, or makes it offensive to him, the city is liable to an action by him for damages, and may be restrained by injunction at his suit from continuing the nuisance: *Haskell v. New Bedford*, 108 Mass., 208.

STATUTE OF LIMITATIONS.

The payment of a sum of money on an open book account which has never been presented or recognized in its entirety, is not a fact from which alone a promise to pay can be inferred, so as to take the whole account out of the statute of limitations: *Vaughan v. Hankinson's administrator*, 35 N. J., 79.

SUPERVISORS.

By the apportionment of 1860, the boundaries of an Assembly District were so changed that the person previously elected in such district as a member of the County Board of Supervisors ceased to be a resident thereof:

*Held*, that he did not thereby lose his office of Supervisor.

Downer, J., dissents. State *ex rel.*: *Gill v. Supervisors of Milwaukee County*, 21 Wis., 449.

TAXATION AND TAXES.

1. Property, in order to be exempt from taxation, because used for educational purposes, must be used directly, immediately and exclusively for such purposes: *St Mary's College v. Crowl, Treasurer, etc.*, 10 Kans., 442.

2. Where, by a city charter, lot owners are to be notified to do work on streets adjoining their lots, before contracts for such work are let, an assessment upon the lot to pay for the work done by contract, without such notice, is invalid: *Johnston v. City of Oshkosh*, 21 Wis., 186.

3. A provision in such charter that the directions therein given for assessing land and levying and collecting taxes and assessments, shall be deemed only directory, and no error or informality in the proceedings of the officers intrusted with the same, not affecting the substantial justice of the tax itself, shall affect its validity:

*Held*, to apply only to proceedings after the debt or liability for which a tax is levied has been lawfully created. In case of such failure to notify the lot owner, no liability on his part is created: *Ib.*

#### TAX TITLE—WHO MAY ACQUIRE.

Where the mortgage of land, and the foreclosure judgment and sale, purport to be of the whole premises, but the purchaser acquires in fact only an undivided part, and becomes in law tenant in common with the mortgagor, he may take title to the remainder by purchase of an outstanding tax deed of the whole, his claim to title to the whole under the foreclosure sale being adverse to that of the mortgagor: *Wright v. Sperry and wife*, 21 Wis., 336.

#### TRUST.

1. So long as an express trust, on which lands have been conveyed without the same being manifested and proved by some writing, remains unexecuted, it is incapable of legal recognition with a view to compel its legal performance by action: *Eaton v. Eaton*, 35 N. J., 290.

2. But if the trust has been executed by the performance by the trustee of the fiduciary obligation which rested merely in parol, no action can be maintained to recover back the money paid by way of such performance. The statute of frauds is an insuperable barrier to an action to enforce a parol contract within its provisions, but it does not make the transaction illegal, and parties are at liberty to act under such contracts if they see proper: *Ib.*

3. When a person, with a full knowledge of the facts, voluntarily pays money which the law would not compel him to pay, but which, in equity and conscience, he ought to have paid, he has no remedy to recover it back: *Ib.*

4. In an action to recover back money thus paid, parol proof not offered to establish the existence of the trust, with a view to its enforcement as a legal obligation, but as part of defense, that the money was a voluntary payment on an obligation, which, though not legally binding, was obligatory "*in foro conscientiae*," is competent: *Ib.*

5. A trustee, holding bonds payable to himself, has the legal estate, and, in the absence of fraud or collusion, may discharge the obligors by accepting payment in a depreciated currency; though as between the trustee and *cestui que trust*, such acceptance amounts to a breach of trust: *Creighton v. Pringle*, 3 S. C., 78.

6. When a voluntary trust, for a specific charitable purpose, fails for want of a *cestui que trust*, the trust, whether created by deed or devise, results to the donor: *Pringle v. Dorsey*, *Ib.* 502.

#### USURY.

An accommodation acceptance of a bill of exchange for a commission, to enable the drawer to raise money by discounting it, where commission and discount amount to more than legal interest, is not *per se* usurious on the part of the acceptor. In a suit by the acceptor against the drawer to recover the amount which he alleges he had to pay on his acceptance, whether this method was used as a cloak for usury or not, is a question of fact for the jury. If the acceptor was the real lender, it would be usury; but if the transaction was a *bona fide* sale of credit, it would not. The judge in this case, to whom was referred questions of law and fact, having found the

transaction untainted with usury, which finding is supported by evidence, this court will not disturb the judgment: *Lay v. Seago*, 47 Ga., 82.

WAY.

1. The damages of an abutter from widening a street and changing its grade, are, besides the value of his land taken for the widening, the amount of the depreciation of his remaining estate, considering all the circumstances of the condition in which it is left by the alteration of the street, and its capabilities either for sale or valuable use, or for improvement in such manner as he may choose; but in assessing them, evidence is inadmissible of the expenses of particular improvements which he may see fit to adopt in consequence of the alteration of the street, such as moving a dwelling house, already standing more than fifty feet from the line of the street, still farther back from it: *Chase v. Worcester*, 108 Mass., 60.

2. Interest on damages assessed for taking land to widen a street should be allowed only from the time of the actual entry on the land, and not from the time of the passing of the order for taking it, in the absence of evidence that the owner has been put to trouble and expense, or has incurred the loss of any advantage from the use of his land, by proceedings before the entry, which has not been considered in the damages: *Edwards v. Boston*, *Ib.*, 535.

WILLS.

Devise of a plantation to testator's wife for life, "and at her death to be appraised by three disinterested free-holders; and that my son W. have the right to said plantation at the appraised value, if he choose to do so, at a credit of one, two and three years, in equal annual payments, without interest; but if he should decline to take said plantation, then my executors are to sell . . . the same and the money arising from the sale . . . to be divided amongst my children. At the death of testator's widow, the plantation was appraised, and W. having elected to take it, gave to the executors his three sealed notes, payable in one, two and three years, each for one-third of the appraised value, but failed to pay the notes at maturity:

*Held*, that payment of the appraised value was a condition annexed to the devise, and that W. having failed to perform the condition his estate ceased: *Thomas v. Kelly*, 3 S. C. Rep., 210.

## RECENT AMERICAN DECISIONS.

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CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE—JAN. TERM, 1874

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### STATE v. MILLER.

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Disqualification of juror on account of impressions or opinion formed from reading newspaper accounts of the facts of a case.

The defendant was convicted for larceny and moves for a new trial upon the ground that he had not an impartial jury. L. M. Jones is the juror to whom exception was taken, and overruled by the Court, who stated; "That he had read a newspaper statement of the case; it professed to give a statement of the facts; he did not know, but supposed it was true; from it he now had an impression or opinion as to the guilt or innocence of the defendant, but from no other source; it was by no means a fixed opinion, had no bias or prejudice in the world against the defendant—did not know him, that whatever opinion he had he felt that it was of such a character that it would readily give way to the testimony, and that he felt that his verdict would be based exclusively upon the law and evidence given on trial."

A fair analysis of the juror's statement would be that he had no bias or prejudice; but some sort of an opinion, based on newspaper statements, not fixed in its character, and a consciousness that his verdict would rest alone on the evidence given on trial. In other words, an opinion as to guilt or innocence, based exclusively on newspaper accounts, with a conscious ability to lay it aside, and to be controlled by the proof in the case. Was he a competent juror? It is claimed that he was not an impartial juror, and that for the defendant to have been forced to take him was violative of section 9, of the Bill of Rights, which declares, "That in prosecutions by indictment or presentment, the defendant is entitled to a speedy public trial by an impartial jury." It is said that to be impartial, one's mind must be like a piece of blank paper, *unimpressed*. This is, of course, desirable, where obtainable, and in such an instance, the juror is undoubtedly impartial. But we think he may be impartial, in the sense of the law, when his mind is not altogether free from pre-conceptions as to the guilt or innocence of the accused. This view is supported by abundant authorities. Say the Court, in *Holt v. People*, 13 Mich., 224, "It is not required that jurors should come to the investigation of criminal charges with minds entirely *unimpressed* by what they have heard in regard to them, or entirely without information concerning them, if they would not thereby be prejudiced from giving due weight to the presumption of innocence of the accused." Again, that an impression does not disqualify, see 3 Denio, 84, *Com. v. Honeyman*, 121, *Ib.*; *State v Ward*, 14 La., An. 673. Again, it is well settled, says the Court, in 4 Sneed, 608, "That an opinion formed upon mere rumor, though entertained at the time the juror is presented, does not disqualify him." See also, in support of this view, *Frank Riddle v State*, 3 Heisk., 407; 44 La. An. *State v. Davis*, 461, 29 Miss. (8 Jones), 391. But our own authorities have gone to the extent that it is well settled, that the mere fact that a person has an opinion, has made up his mind as to the guilt or innocence of the prisoner, does not disqualify him as a jurymen: *Alfred & Anthony v. State*, 2

Swan, 581; *Moses v. State*, 10 Hump. 456-58. "It is," says the Court, "not the existence of an opinion, either way, which constitutes the disqualification, but the grounds on which it is formed; 2 Swan 583. Or it might be speaking more correctly to say, that the law does not regard an opinion at all, unless based upon a knowledge of reliable information of the facts; 2 Swan 583. These authorities clearly prove that the mind need not be wholly without impressions in order that the juror should be impartial; that something more, or different from this, may exist, and yet the juror remain impartial.

What at last is the true test of impartiality? The juror takes an oath that he will render a verdict upon the law and evidence, and when he is able to do this irrespective of any impressions or present opinions, he is a competent juror by reason of his impartiality. And this is so, it matters not what he may have read or heard. Now, when can he do this? He must necessarily know the state of his own mind and feelings, better than any other person. He is sworn as a witness to testify as to these facts. In the first place, we would remark, that like any other witness, when in response to an inquiry as to the fact whether or not he has any bias or prejudice, he answers in the negative, we accept his reply as *prima facie* correct, of course, subject to be rebutted by counter-vailing testimony; but in the absence of any impeachment of his statement from any source, we take his word as a correct representation of his feelings. Now if this is true as to his feelings, why is he not equally as reliable a witness as to the state of his mind towards the parties? Should not this also be received, until in some way the contrary is shown, as *prima facie* correct? Does he not know better than any one else when and how he derived whatever opinion he may have; better than any other person, the character and strength of this opinion? Is it not strange that we will credit him as to the state of his feelings, but not as to the state of his mind? His statement is liable to be overthrown by the manner of his examination, its utter improbability in view of his relation to the case, in some way, or by other witnesses, but when this is not done, it does seem that we should not arbitrarily reject his sworn statement of facts which make him a competent juror. How strange that he may be accepted as a perfectly reliable witness about every other matter in the world, and yet we will not accept his testimony as even *prima facie* correct, when he speaks of his mental condition, as to which he ought to know, and does know more than all others. And yet such has been some of the adjudications. The strength of his opinion depends, of course, upon his interest, attention, opportunities at the time for correctly acquainting himself with the facts, the extent of his confidence in the sources of his information, and many other things transpiring at the time which may have been of an accidental or incidental character. Now, in *Moses v. State*, 10 Hump., 459, it is said, "The competency of the juror is determined more from the character of the impression than the source from which such an impression may be derived. Strictly speaking, we think this is the better philosophy, though in seeming conflict with the later case, 2 Swan, already referred to, where it is said that it is the source and not the existence of the opinion which disqualifies. The most ignorant are frequently the most dogmatic and opinionated, and concurring rumors to them "are confirmation strong as proofs of Holy writ." From the most unsatisfactory sources of credit they have the most settled and confirmed opinions of guilt or innocence. Whereas, on the other hand, the most intelligent gentlemen put the least possible estimate on neighborhood gossipings and the vaporings of busy-bodies.

The experience of mankind attests the utter untrustworthiness of such sources of

information. Hence, some general rule must be adopted which, in certain cases, may operate injuriously, by which the competency of jurors may be determined. And the fact that such a rule may work a wrong at times, only proves that courts in such matters should have an enlarged discretion in the selection of jurors. This general rule, which has been established in this State as well as elsewhere, is, that it is the *ground* on which the opinion rests that determines the competency of the party to serve as a juror. There must be something more than an unsettled opinion upon an unreliable basis. The opinion should not be of a mere vacillating nature. To illustrate by the citation of authorities:

In *Kendricks' case*, 5 Leigh, 707, persons called to serve as jurors in a criminal case, when examined on their *voir dire*, said that they had *heard part of the evidence* on a former investigation, and formed some opinion thereon, yet the opinion so formed would in no wise influence their minds as jurors, but that they could act upon the cases impartially: Held good jurors. In 4 Denio, 94, *Freeman v. People*, the juror had an impression that the prisoner was guilty, but not an absolute opinion. The challenge was not sustained. In *Sothwell v. The People*, 1 Coms., 384, and *The People v. Bodine*, 3 Denio, 122, questions were put to jurors whether they could try the case, render an impartial verdict, notwithstanding their impressions or opinions, and on answering that they could, they were held to be good jurors. An impression or inclination of mind towards a conclusion is not enough. He must have reached a conclusion upon which he would be willing to act in ordinary matters: *State v. Thompson*, 9 Iowa, 188; *State v. Gullick*, 10 Iowa, 98. This unqualified opinion usually involves a belief in the facts as well as a conclusion from them: *Same authority*. Again, in *People v. Mahoney*, 18 Cal., 180, where a juror stated that from what he had read and heard about the defendant, he had received an impression that he was a bad man, which it might require evidence to remove, and that he should think him more likely to be guilty of a crime than one of whom he had not heard such things, but that he was not conscious of any such bias that would prevent him giving him a fair trial: Held competent. Again, where a juror stated that he had not formed an unqualified opinion; that if what he had heard should be proved on trial, he had an opinion made up, but he thought he had no prejudice or bias to prevent him from hearing the evidence and giving a verdict in accordance with the law and testimony: *State v. Sater*, 8 Clarke, 420: Held competent. If the juror has not *definitely* made up and expressed his mind on the question at issue, he is not liable to exception, though he has *read and heard* concerning it: *State v. Berton*, 2 Dev. and Bat., 196; *State v. Scott*, 1 Hawks, 24; *State v. Ellington*, 7 Ired., 61, and other North Carolina authorities. The fact that a person presided as Coroner at an inquest does not disqualify him as a juror in the trial of an indictment for the murder of the party on whose body the inquest was held, when he testifies that he has neither expressed or formed an opinion as to the guilt or innocence of the prisoner: *O'Conner v. State*, 9 Fla., 215. Again it is laid down in 18 Ga., 383: "Neither the formation nor expression of an opinion will disqualify a juror, unless it be *settled and abiding*." In *Monroe v. State*, 23 Texas, 210, it is said: "A juror on a trial for murder, who on his *voir dire* stated that he *had heard part of the evidence* before the examining committee, and had *formed a partial opinion*, which might influence his verdict to some extent, but that he had no fixed opinion to influence his verdict, is not disqualified. In *People v. Stout*, 4 Parker Cr. R. (N. Y.), 171, and *Stout v. People*, *Ib.*, 132, the doctrine is expressed that to sustain a challenge for principal cause, on the ground that the juror has expressed an opinion, it must appear that the opinion was *absolute and settled*. It is not enough that it was hypothetical and uncertain. In the last case a juror was declared competent (and this was a murder case) who stated,

after being challenged for principal cause, "That he thought he had an impression as to the prisoner's guilt or innocence; that he rather thought he had formed an opinion; that he presumed he had expressed it, and thought he retained it; that he had formed an opinion that the *newspaper accounts* of the transaction, of which he had read only a part, were true, and that so far as he read he gave them credence; that it might or might not require evidence to remove his impressions of the prisoner's guilt, and that he had not arrived at any definite opinion." The Court overruled the challenge, and on review it was affirmed. In *Sanclerg v. People*, 4 Parker Cr. R. (N. Y.), 535, a juror, on challenge for favor, swore that he had read part of the newspaper accounts at the time, and had formed an idea with regard to the prisoner's guilt or innocence; that he had no bias either way; that his verdict would not be influenced by his pre-conceived idea, but would be governed entirely by the evidence produced. He was adjudged competent.

Let us further see the views of some of our most eminent jurists as to whether an opinion based on newspaper accounts should disqualify a juror. Chief Justice Hornblower, of New Jersey, as far back as 1846, in a capital case, said, it has been supposed that an opinion of guilt founded upon newspaper reports, or other information or personal knowledge, disqualifies a man from being a juror. But this is not so. It has been solemnly declared by our own Supreme Court, in *Mann v. Glover*, 2 Green, 195, that a hypothetical opinion, founded on the supposition that the facts detailed are true, is no cause of challenge. I have no hesitation, continues he, in saying that a bystander who sees the commission of a homicide, or another a breach of the peace, is a perfectly competent juror; as much so as a witness to a bond or other contract between private parties would be on a trial concerning such bond or contract. It is a common occurrence, both in civil and criminal causes, to see jurors on the panel called as witnesses to prove some material facts in their knowledge relating to the matter in question. A declaration of opinion to disqualify a juror, therefore, must be such as implies malice or ill-will against the prisoner, thereby showing that the person challenged does not stand indifferent between the State and him. This is the uniform language of the books and cases which are of authority under our Constitution, as well as of the English courts up to the present time:" *State v. Fox*, 1 Dutcher, 566. (See Wharton's Am. Cr. Law, 6th ed., sec. 2,991.) Chief Justice Taney, in 1854, said: "If the juror has formed an opinion that the prisoners are guilty, and entertains that opinion now, without waiting to hear the testimony, then he is incompetent. But if from reading the *newspapers*, or hearing reports, he has impressions on his mind unfavorable to the prisoners, but has no opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, then he is competent."

Chief Justice Shaw, in the celebrated Webster case, 5 Cush., 295, said: "The opinion of the juror, to disqualify, must be something more than a vague impression formed from casual conversation with others, or from reading imperfect abbreviated newspaper reports. It must be such an opinion upon the *merits* of the question as would be likely to bias or prevent a candid judgment upon a *full hearing* of the evidence. If one had formed what, in some sense, might have been called an opinion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror." This opinion is also announced by Chief Justice Parker in *State v. Howard*, 17 N. H., 171. Again, in *State v. Pike*, N. H. Rep., April No. Am. Law Reg., 1872, capital case, the Supreme Court held that the juror was competent who stated that he had read the reports in a newspaper, and from them derived the impression that the defendant was guilty. "Taking the reports to be true, I think the defendant was guilty; but I pay little attention to such reports.

Notwithstanding what I read in the newspaper, and the impressions I received from reading it, I think I could try the defendant on the evidence without prejudice. I think I have no opinion or impression which would prevent me from trying him impartially on the evidence."

From the foregoing authorities we draw the conclusion that the opinion of the juror to disqualify, must be something more than a mere impression, a hypothetical opinion, something floating and indefinite in its nature, but to some extent must be of a fixed and decided character. And not only must this be so as to its decisiveness, but to use the language in 2 Swan, 583, it must be based upon a knowledge or reliable information of the facts, and that where this is not the case, it is to speak more correctly, in contemplation of law *no opinion at all*. These authorities also teach this important lesson, that the statement of a party under oath, of his ability to be governed entirely by the proof on trial, whatever may have been his prior impressions as to the guilt or innocence of the accused, should be credited until it is in some legal manner discredited.

But newspaper reports are neither knowledge nor reliable information of the facts and this seems to have been the opinion of the distinguished lawyers just quoted, and this accords with the general and almost every day experience of judges within whose jurisdiction are published newspapers. And from the very nature of the case it must be so. The purported facts published, always more or less imperfectly collected from every conceivable source, are in the highest sense hearsay testimony, and then this, with its tangled odds and ends, is wrought according to the fancy, humor or feelings of the writer into sensational paragraphs and published with heavily-leded sensational headings. The facts of the occurrence are partially gathered and published often without reference to the order or time in which they took place, with all the embellishments of the printer's art. How often do we see cases denounced in the papers as aggravated homicides excused by the proof on trial, and those mildly commented on in the light of the testimony, become acts of flagrant crimes. While they may publish some of the facts, yet enough remain unpublished to give color, significance and control to the crime as a whole. And so generally is this known by judges and the newspaper reading public, that scarcely any honest and intelligent man (and the law requires this kind to be jurors,) ever forms, from such sources any other than an indefinite, unsettled idea of the case. There is a mental reservation, if the facts are so as reported, then he has an opinion; it is always more or less hypothetical in its character. And even in cases where the newspaper reports are thought to be true, yet so near akin to rumor is the information by reason of their incompleteness, and generally their actual uncertainty in fact, that we think if the party is fit to be a juror, being honest and intelligent, he can readily, as in cases of rumor, yield his preconceptions based on such information, to the logical force of sworn statements. An opinion based on rumor, carried into the jury-box, and even so strong as to create a bias or prejudice, is no ground of challenge according to the 2 Swan case, 583, and if this be so, we can not see how an opinion based on newspaper paragraphs, (we do not refer to published evidence) where the party himself says he feels fully conscious of his ability to lay it aside, and be governed exclusively by the proof on trial, should not, at least, be received as true until in some way the contrary is shown.

The fact is, as Courts, we must use some common sense about these questions, as about other matters. This at least is the very substratum of all true law knowledge. The refinements of the lawyer too often make him lose sight of the sound and practical. The reading public are far in advance of the judiciary on this question, for it is the aggregated experience of the honest and intelligent, that "newspaper opinions" are of the most unsatisfactory and unsubstantial character, and that they should dis-

qualify in their estimation, is a reproach upon the administration of law. Intelligence is to-day proscribed in the jury-box, though the law requires the juror to be esteemed in the community for his integrity, fair character, and sound judgment: Code, 3990. In its place ignorance and stupidity sit down and hold in their keeping the liberties and lives of our people. How long shall we rest under the imputation, that the judiciary by subtleties, technical and impracticable constructions, expose the well being of the State to the custody of stolid ignorance and purchasable corruption?

The great point, at last, in determining competency is this, and we would impress it with all our power, that when a verdict can be rendered on the law, and evidence given on trial, the juror is competent, and this is so, it matters not whatever may have been his preconceptions of the case. And if his statement is not improbable in itself, nor rendered improbable in the course of the examination, if he says he can do so, we should not arbitrarily reject his evidence to that effect. To adopt any other rule in this day, marked more than ever before by the wonderful inter-communication of thought, and the easy and rapid dissemination of intelligence, would be as it is now in this State, and I speak it in shame, to leave the peace of society in the hands of the ignorant and dishonest Philistines. The bigger the thief and the bloodier the criminal, the greater their notoriety, and the less liability to punishment. The founders of the Constitution, in their wisdom and humanity, in granting an impartial jury to one accused of crime, never, we conceive, in their wildest imaginings, supposed that such a construction would be placed upon the law as to render the law itself nugatory. Our English ancestors, from whom we derived this right, never contemplated such a construction. In Coke's Littleton, vol. 3, p. 464, it is said, "Every trial shall be out of that town, parish or hamlet, or place known out of the town within the record, within which the matter of fact issueable is alleged, which is most certain and nearest thereto, the inhabitants whereof may have the better and more certain knowledge of the fact." How far and strangely we have departed from the original practice in jury trials.

But in reply to the foregoing it may be answered that in the case of the *State v. Eason*, opinion yet unpublished, the law was declared unconstitutional which stated that an opinion founded on newspaper reports was no good ground of challenge for principal cause. In that case the jury was formed under the act declared unconstitutional, and the transcript in some unaccountable manner showed that the Court below had ruled that a juror was competent, although he stated that he had formed so decided an opinion on newspaper statements that it would *require full proof to remove it*. In justice to the Court below, it appeared, upon a comparison of the transcript, after it had gone to the Supreme Court with the original bill of exceptions, that the latter did not say that it would require full proof to remove said opinion so formed, nor did it in substance state so. The juror, upon the record upon which the Supreme Court then acted, was undoubtedly incompetent. But the facts here fall far short of that case. We, in principle, too, agree with the Supreme Court, that no act of the Legislature can make one impartial. This implies a certain mental condition required by the Constitution, and no legislation can reach or affect it. So it will be seen, that the question is not whether in reality the act of the Legislature is constitutional, but whether, independent and outside of all legislation, the man is impartial; a mental fact not depending on positive statute but exclusively on mental condition. The same facts constitute impartiality before and since the statute was in force. Declare the law unconstitutional, and the same practical question lives, invoking a solution at the hands of the courts.

The courts of Ohio, we think, and those of New York, have declared that opinions predicated on newspaper reports should not disqualify the juror as incompetent.

And unless this rule is adopted, one founded in sound reason and justice, the people, in thickly populated localities and metropolitan districts, where daily papers are published, will be powerless to punish criminals, for imbecility and dishonesty will soon become the guardians of the public tranquillity. Gentlemen, men of sense and honesty of purpose in our cities, in cases of any notoriety, will have to vacate the jury-box for a set of swarming, professional jurymen, and well-manipulated, untaxed loafers. Sooner or later we feel the position taken in this paper on this "newspaper opinion" question must be adopted generally by the courts of the country if this country is to have the blessings of well-regulated liberty.

It may, in conclusion, be proper to add that the judgment of the Court, passing upon the competency of the juror, should seldom be reversed. The manner of the juror on examination, and many little incidents and surroundings, may serve as the best interpreters of the juror's mind, and even then may contradict his statements, yet the Court may, much more intelligently for these reasons and for others occurring at the time, which may be seen, detected and yet not defined, judge of his competency, than any reviewing tribunal. Appearances, mannerism, and other things transpiring at the time, the Court below recognizes and fully weighs, but these things by reason of their indefinable, intangible nature can never pass into a bill of exceptions.

But we have already written too much. We have felt that the magnitude of the issue discussed, involves to some extent the best interests of society; whether hereafter, as now, worthlessness and not worth, as a rule, shall sit in mock judgment on the trial of the greater criminals. While the Court has the power to designate the panel this power is practically a nullity, for those whom the Court would select on the panel for their fitness, rest under the bans of judicial disqualification. Let the judiciary now take one step forward, and criminals will feel more than ever the certainty and swiftness of punishment, and society will breathe freer and better than ever before.

The motion for a new trial will be overruled.

FLIPPIN, J.

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IN THE CHANCERY COURT AT NASHVILLE, TENN.—MAY TERM, 1874.

*N. E. Perkins et al. v. Peter A. Perkins et al.*

A voluntary settlement not void as to existing creditors, *per se*.

This record consists of three attachment suits, brought by three different creditors of Peter A. Perkins, against the same defendants to reach the same funds. The first bill was filed on the 6th of May, 1865, by N. E. Perkins; the second, on the 10th of May, 1865, by John S. Park, and the third, on the 23d of August, 1865, by Jas. A. and Wm. R. McAllister. The object of each suit is to subject to the satisfaction of the debt of the complainant a note of the defendants, James and George Lumsden, dated 24th of October, 1861, and made payable to Peter A. Perkins, at twelve months, for \$12,488, and which note had been transferred and assigned by the said Peter A. Perkins, on the 31st of May, 1862, to the defendant, W. O'N. Perkins,

by deed of settlement of that date conveying said note, with other property, to W. O'N. Perkins in trust for the sole and separate use of Sarah A. Perkins, the wife of the said Peter A. Perkins, and their children. The first bill is based solely upon the ground that the liability on which the complainant proceeds is a debt of Peter A. Perkins, which was in existence at the time the deed of settlement was made; that said Peter A. was also then indebted to other persons in other sums; that the settlement was voluntary and without consideration, and therefore fraudulent and void as to said creditors. The second bill is almost identically the same in substance, alleging in addition that "much of such other indebtedness, as well as the debt of your orator, remains unpaid." The third bill avers that the said Peter A. Perkins, at the time of making the settlement was "largely indebted and indeed without property sufficient to discharge his then indebtedness, a large amount of which still remains unpaid, and that his object and intention in the making of such pretended settlement was, as your orators are informed, believe and charge, to place said note or notes, or the proceeds thereof, beyond the reach of his then creditors." And so complainants charge, that the settlement was made with the intent and for the purpose of hindering, delaying and defrauding the creditors of the said Peter A. Perkins.

Peter A. Perkins, his wife, Sarah A. Perkins, and W. O'N. Perkins, each filed separate answers denying all fraud, and alleging, that the settlement was made in good faith for the purpose of making a suitable and proper provision for the wife and children, in view of the circumstances of the husband at the time, and that he retained ample means to pay off all his then creditors. Mrs. Perkins, in addition, insists that the settlement was made in fulfillment of a promise given to her by her husband in the year 1850, or about that time, in consideration of the fact that she had united with him in selling certain real estate which descended to her from her father, and had also received a number of slaves and other personalty through her.

The Lumsdens answered, admitting that in October, 1861, they bought of Peter A. Perkins a valuable tract of land in Williamson county, Tenn, at the price of \$40,000, of which they paid in cash \$27,512, and gave their note at one year from the 24th of October, 1861, for \$12,488; that this note was, they believe, transferred and assigned to W. O'N. Perkins as charged, and that they had paid all of it except about \$3,000. They stated that Peter A. Perkins had made them a deed to said land in fee with covenants of warranty and seizin, and against incumbrances, but retaining a lien for the purchase money until fully paid: That the land was in fact at the time, without their knowledge and contrary to the assurances made by the vendor, subject to a judgment in the Circuit Court of Williamson county, recovered by Jackson and Adams against said Peter A. Perkins, on the 11th of March, 1861, for \$—, from which an appeal was taken to the Supreme Court, where the judgment had been recently affirmed, and execution had been issued and levied on the land, the debt amounting to \$1,405 and costs. They insist that they are entitled to be protected in the first instance to the extent of the said judgment lien, and the justness of this claim was conceded in argument.

Proof was taken, and the cause heard by the Chancellor on the 3rd of August, 1867, who rendered a decree in favor of the complainants. An appeal was taken to the Supreme Court by W. O'N. Perkins, trustee, and Sarah A. Perkins, and the cause was by that Court remanded, with directions to make the children of Peter A. and Sarah A. Perkins parties to the suit, the Court being of opinion that they were necessary parties. This has been done, and new proof taken, and the cause has again come on to be heard.

Only one of the bills, it will be recollected, and that the last one filed, alleges that the settlement and transfer attached was made with a fraudulent intent in fact to hinder and delay creditors, the other two bills relying only on the ground that the settlement was voluntary, and, in view of the indebtedness of Peter A. Perkins to them, and other persons, at the time, fraudulent by implication of law. The fraud in fact charged in the McAllister bill, is denied positively by the answers, and is clearly not sustained by the proof, and may be laid out of view.

The controversy is, therefore, narrowed down to the point whether the transfer and assignment of the note, and the settlement of Peter A. Perkins on his wife and children by his deed of the 31st of May, 1862, is void in law, under the circumstances developed in the record, in favor of the complainants as creditors at the time. The first two bills expressly charge that the note in controversy was transferred and assigned to the defendant, W. O'N. Perkins as trustee. The McAllister bill, which is worded more cautiously than either of the others, states that the note was held and claimed by W. O'N. Perkins, under the trust settlement which is attacked. The trustee, in his answer, states that the note was "indorsed and delivered" to him by Peter A. Perkins, the payee. My attention has been directed to the exact state of facts made in the pleadings and proof, by the line of argument of the complainant's counsel on the assignment of the note. His argument is, that there is no evidence of the indorsement of the note by Peter A. Perkins, and that the assignment of the note by the deed carried only an equitable title, which is incomplete as to a creditor of the assignor unless notice has been given to the debtor; that the registration of the deed of settlement would not operate as notice of the assignment of the note, there being no law requiring the registration of deeds by which notes are assigned. The result would be, from these premises, that the right of the attaching creditors would be superior to that of the trustee under the assignment. But the defect in the reasoning is, in contending that a negotiable security falls within the principle contended for, and which has been recognized by our Supreme Court, in relation to the assignment of a chose in action: *Clodfelter v. Cox*, 1 Sn., 330, 339. Negotiable securities, it is well settled, and by our own courts, are not choses in action to which the rule referred to applies: *Sugy v. Powell*, 1 Head., 221; *Mu. Prot. Ins. Co. v. Hamilton*, 8 Sn., 269, 274: And may be transferred by delivery, so as to pass the entire right as against the debtor, whether the legal title in the instrument passed by the assignment or not: *Gayoso Savings Inst. v. Fellows*, 6 Cold., 487. Besides, although the registration of a deed assigning choses in action is not required, yet such registration, in all cases of conveyances of goods or chattels on a consideration not deemed valuable in law, is made necessary as against creditors of the grantor, unless possession remains with the donee: Code, §1760. In this case, the note was delivered certainly, and perhaps assigned to the trustee, and has remained in his possession. The deed of settlement, moreover, was duly proved and registered in September, 1862. Every requirement of the law to validate the gift, if it be a gift, has been complied with, and the right of the trustee and beneficiaries is the better right, unless indeed the whole transaction is fraudulent and void by implication of law as against the complainants. For a conveyance may be free from objection under §1760 of the Code, and yet be void for fraud. Whether it is void in such case will depend upon the Code, §1759, and the Statutes of Frauds of 13 and 27 Elizabeth. The question recurs, therefore, is the settlement of the 31st of May, 1862, void by implication of law under the circumstances.

The facts are, that Peter A. Perkins intermarried with the defendant Sarah A., in 1849, and received with her some fifteen slaves, and a tract of land, which she allowed to be sold about 1850 for the benefit of her husband. The wife, as we have

seen, claims in her answer that the husband, in consideration of her consent to this sale, agreed to settle property upon her to her sole and separate use. There can be no doubt that such a contract, clearly and distinctly proved, would sustain a conveyance to, or for the benefit of, the wife: *Powell v. Powell*, 9 Hump., 484, and *Reedy v. Bragg*, 1 Head, 513. The true rule on the subject was laid down by the Vice Chancellor in *Wicks v. Clarke*, 3 Edw., 58: "Prior advances to the husband out of a wife's property, will not be taken as part consideration of a settlement (when not mentioned therein), unless there was an agreement, at the time that they were made, to secure her a settlement. There must be an intentional connection between the previous advances and the subsequent deed." But the evidence relied upon in this case, outside of the testimony of the husband and wife, which is clearly incompetent, is not satisfactory of any agreement at all, and the claim of the wife in this regard is not mentioned in the settlement nor connected with it, and can not be sustained.

At the time of the settlement upon his wife, Peter A. Perkins was a man of handsome estate. He owned sixty or seventy slaves, part in this State on the plantation sold to the Lumsdens, part in Mississippi, on a plantation which he seems to have bought not long before, and on which he had made one payment of several thousand dollars. He owned personal property on his farms, and held debts or choses in action on third persons. The sale to Lumsden in October, 1861, was for \$40,000, of which he retained the cash payment, \$27,512, and settled on his wife the note for the deferred payment, \$12,488. He also conveyed in trust for her about one half of his slaves, retaining the other half, and all his other personalty. All the debts that he then owed, so far as the proof shows, excluding the debt for the land in Mississippi, which seems to have been subsequently paid by a sale or return of the land itself, and excluding also the debts due to the complainants, amounted to only about \$2,325.89, of which \$1,457.58 were subsequently paid out of his effects. The residue, being the Jackson and Adams judgment, was in the Supreme Court by appeal, and paid by the Lumsdens to protect the land they had bought from being sold under execution thereon, as explained in their answer. The proof shows that Peter A. Perkins had paid in 1859, 1860 and 1861, judgments against him to the amount of \$13,222.75; and on the 9th of December, 1861, he paid other judgments amounting to \$10,255.92. This last amount was probably paid out of the money received from the Lumsdens, leaving still in his hands of that money over \$17,000. The complainant's claims were at that time between three and four thousand dollars.

The continuous payment of his debts up to the settlement on his wife is strongly persuasive that Peter A. Perkins was not thus seeking to cover up his property, or perhaps dreaming of insolvency. The fact, as shown by the proof, that the Bostick debt was collected by legal proceedings, to which no resistance was made, and that the surplus proceeds of sale were paid over to Mrs. Perkins for her husband, who was then in Kentucky, shows that active diligence on the part of creditors would not have been without fruit. There is nothing in the proof tending to show that Peter A. Perkins, at any time, sought to cover up his property, or avoid the payment of his just debts. He had, when the settlement is made, so far as appears, sixty or seventy slaves, \$17,000 in money, about the same perhaps in notes, and a few thousand dollars in personalty.

The question then comes to this: Is the settlement upon a wife and children, made in good faith by a solvent, and even wealthy debtor, of one-half his slaves and about one-third of his other personalty, void in law because he was then indebted to the extent of three or four thousand dollars which still remains unpaid, the money and other personalty, exclusive of slaves, amounting to four or five times the debt, and the slaves themselves, most of them being in Mississippi, worth in

ordinary times probably \$15,000 in addition. Or to put the question more tersely: Is a voluntary settlement in favor of wife and children by a debtor of one-third of his clearly valuable property and one-half of his doubtful property, good against creditors where the valuable property retained exceeds the debts four or five times, and the doubtful property nominally as much more, depending as to its value upon a contingency then uncertain? Put in this form, there can be but one answer, unless the law settles the matter otherwise, by a stern and inflexible rule, such as was laid down by Chancellor Kent in *Reade v. Livingston*, 3 J. Ch., 501. That rule was, that a voluntary settlement was void as to existing creditors *per se*, being put by the distinguished Chancellor upon high grounds of public policy, and as he thought, sustained by the actual decisions up to that date.

As long ago as the time of Lord Hardwicke, that eminent Judge in the case of *Russel v. Hammond*, 1 Atk., 15, referred to by our Supreme Court in *Smith v. Greer*, 3 Hum., 121, but by a wrong name, is reported to have said that "there are many opinions that every voluntary settlement is not fraudulent; what the Judges mean is, that a settlement being voluntary is not for that reason fraudulent, but an evidence of fraud only. Though," he adds, "I have hardly known a case where the person conveying was indebted at the time of the conveyance that has not been deemed fraudulent."

The key-note thus struck by the master hand has been echoed by his successors until the harmony of the rulings may be considered as controlled by it. The meaning is, that the fact that the conveyance is voluntary, is presumptive of fraud as to existing creditors, a presumption not easily overturned, but which, nevertheless, like all presumptions may be explained away. It was not every indebtedness of the grantor which would be held to hinder and delay creditors. The general rule thus expressed, was followed up by Lord Alvanley, the Master of the Rolls, in *Lusk v. Wilkinson*, 5 Ves., 387, defining the indebtedness which ought to avoid the deed as to existing creditors. It ought not to be any indebtedness, for there is scarcely any man who can avoid being indebted to some amount. "It must depend," he says, "upon this: whether he was in insolvent circumstances at the time." Chancellor Kent, in *Reade v. Livingston*, speaks of this as a loose dictum, without any preceding decision to give countenance to it. But it has been followed *literally* by the subsequent English cases, and is now the settled law of that country: *Shears v. Rogers*, 3 Barn & Ald., 362; *Gule v. Williamson*, 8 Mees. & Wels., 405, 409, 411; *Townsend v. Westcott*, 2 Beav., 340, 345. This was the doctrine of *Holloway v. Millard*, 1 Mad. Ch. R., 417, 419, also cited by our Supreme Court in *Smith v. Greer*, 3 Hum., 121. "A conveyance," says Sir Thomas Plumer, in that case, "is not fraudulent merely because it is voluntary. . . . It being voluntary is *prima facie* evidence, where the party is loaded with debt at the time, of an intent to defeat and defraud his creditors."

The conclusion thus reached by the English Courts, upon the statutes of Elizabeth, has long been the settled doctrine of the State of New York, notwithstanding the weight of authority of their great Chancellor. A voluntary conveyance is held not to be *per se* fraudulent even as against creditors to whom the grantor was indebted at the date thereof: *Verplank v. Sterry*, 12 J. Rep., 536; *Bank of the United States v. Housman*, 6 Paige, 526. And even though the grantor do not pay his debts existing at the time: *Van Wyck v. Seward*, 6 Paige, 62; *Jackson v. Town*, 4 Cow., 604.

The subject has undergone frequent discussions before the Supreme Court of the United States, and that Court has come to the conclusion, that the mere fact of indebtedment at the time of the conveyance does not, *per se*, constitute a substantive ground to avoid a voluntary conveyance for fraud, even in regard to prior creditors. The question whether it is fraudulent or not, is to be ascertained not from the mere

fact of indebtedness at the time alone, but from all the circumstances of the case. And if the circumstances do not establish fraud, then the voluntary conveyance is deemed to be above exception: *Hindea, lessee, v. Longworth*, 11 Wheat., 199; *Parrish v. Murfree*, 13 How., 92.

Mr. Justice Story, in his Commentaries on Eq. Jur., § 365, arrives at the same conclusion as the result of the authorities, English and American. And Chancellor Kent, in a note to page 442 of the fourth volume of his Commentaries, 5th ed., concedes the tendency of the authorities to be as stated by Judge Story, and that the conclusions of fraud are to be determined as matters of fact; adding, somewhat mournfully, that "the doctrine of *Reade v. Livingston*, and of those English Chancellors upon whom it is rested, is, as I greatly fear, too stern for the present times."

The decisions of our own Supreme Court are in accord with the current of authority, or, if you choose to adopt the idea of Chancellor Kent, with the degeneracy of the times. "As against existing creditors," say our Court, "the principle is obviously just, that a voluntary settlement or conveyance will be *presumed* fraudulent:" *Nicholas v. Ward*, 1 Head, 323, 326. "But the statute of 13 Eliz. does not declare voluntary settlements void against creditors, but merely declares that a fraudulent deed shall be void against them. If a man be indebted at the time of making a voluntary deed of settlement, it does not follow that it is void for that reason alone; it is only a *presumption* of fraud: Citing 1 Atk., 15, and 1 Mad. Ch. R., 414. To invalidate a *post nuptial* settlement, the husband must not only be indebted, but he must be indebted at the time to an amount sufficient to have the effect of delaying and defeating creditors: *Smith v. Greer*, 3 Hum., 118, 121. Judge Caruthers is, therefore, justified in saying, as he does in *Burkey v. Self*, 4 Sneed, 121: "We consider the weight of authority and reason to be, that indebtedness which bears an inconsiderable proportion in amount to the property reserved, does not, of itself, render a voluntary conveyance void. If the property retained be entirely ample to pay all demands, the gift is good. It can not be presumed in such a case, from the fact of indebtedness alone, that the object was to defeat creditors of their just demands."

The case of *Churchill v. Wells*, 7 Cold., 351, and the Lincoln cases, recently decided by the Court of Arbitration, do not, in the least, contravene this doctrine. Those were cases of fraud in fact.

That the property and effects reserved by Peter A. Perkins at the time of the settlement in controversy, were ample to pay all his debts, and were not fraudulently concealed, is, I think, satisfactorily shown by the proof. The fact that he was subsequently reduced to insolvency by the events of the war, can not be held to operate *ex post facto*. Few of us, with Southern sympathies, were sufficiently prescient of the future to foresee, as early as May, 1862, that the war would end in the overthrow of the new Confederacy, and the entire abolition of property in slaves. The fact that the husband had received the slaves of his wife, and the proceeds of the sale of her realty, although not sufficient, tenders the evidence to establish a consideration for the conveyance in question, goes far to explain the execution of it, and is persuasive of the good faith of the parties to it. This is an extreme case, growing out of the unusual circumstance that the deed was made pending the civil strife, the result of which was disastrous to the grantors beyond reasonable probability, and does not fall altogether in the line of safe precedents. The proof satisfactorily explains away the presumption of fraud from the voluntary character of the conveyance, and the complainants have not satisfied me that there was fraud in fact. The bills must, therefore, be dismissed, but the costs will be paid out of the fund in controversy.

WM. F. COOPER,  
Chancellor.

## COURT OF APPEALS OF VIRGINIA—JUNE TERM, 1873.

*Rollo, Assignee, v. Andes Insurance Company.*

1. The Treasurer of a State, who holds bonds of a foreign Insurance Company, doing business in the State, under the Act of February 3rd, 1866, as amended by the Act of March 3rd, 1871, is not liable to be summoned as garnishee by a foreign creditor of the Insurance Company.
2. A public officer of the State can not be made liable by attachment at the suit of an individual, for funds in his hands clothed with a trust under the authority of a public law.
3. Under the Act of February 3rd, 1866, when a foreign insurance company shall cease to do business in the State, and its liabilities, fixed or contingent, to citizens of the State, shall have been satisfied or terminated, the Treasurer is authorized to deliver to such company the bonds and other securities deposited with him. Though the company has ceased business in the State, and its liabilities to citizens of the State have been satisfied or terminated, the bonds in the hands of the Treasurer can not be attached by a foreign creditor; but they must be delivered by the Treasurer to the company.

JOHNSTON, WILLIAMS & BOULWARE, for the Appellant.

JNO. W. DANIEL and PAGE & MAURY, for the Appellees.

STAPLES, J. By an Act of the Legislature passed February 3rd, 1866, amended by an Act of March 3rd, 1871, no insurance company which has not been incorporated under the laws of Virginia, can carry on its business within the State, until it shall have deposited with the Treasurer of the State, securities—State, corporate or individual—of the cash value at least of ten thousand dollars.

If the securities so deposited are registered or individual bonds, the company is required, at the same time, to deliver to the Treasurer a power of attorney, empowering the latter to transfer the bonds, when necessary, for the purpose of meeting any of the liabilities provided for in the Act. It is also provided, that any foreign insurance company doing business in the State, may be sued in the courts of the commonwealth upon policies of insurance made to citizens or residents therein, in like manner as if such foreign insurance company had been incorporated by the General Assembly.

And by another provision of the Act, it is declared that if such company shall cease to carry on business in this State, and its liabilities, fixed or contingent, to citizens of the State, shall have been satisfied or terminated, upon satisfactory evidence of this fact to the Treasurer, he is authorized to deliver to such company the bonds and other securities deposited with him.

There are other provisions in the Act, but it is not necessary to mention them, as they have no bearing upon the matters in controversy here.

The Andes Insurance Company, incorporated in the State of Ohio, under authority of this statute, deposited with the Treasurer of this State fifty thousand dollars of United States registered bonds, and until the occurrences hereinafter mentioned, has been carrying on the business of insurance in Virginia.

On the 29th of October, 1872, the plaintiff in error, who is the assignee in bankruptcy of the Merchants' Insurance Company of Chicago, sued out of the Clerk's office of the Circuit Court of the city of Richmond, an attachment against the Andes Insurance Company, upon a claim of about seven thousand dollars.

This attachment was served the 30th of October, 1872, upon Joseph Mayo, State Treasurer, by delivering to him a copy, and summoning him to appear as garnishee at the next term of the Circuit Court.

When the attachment came on to be heard, a motion to abate it was made on several grounds. This motion was sustained by the Court; and the attachment was thereupon quashed. The case is before us upon a writ of error and *supersedeas* to that judgment. It is not deemed necessary to consider all of the grounds suggested for abating the attachment, as, in our view, one of them is decisive of the case.

It is important, in the first place, properly to understand the nature and effect of the process of garnishment. Garnishment is substantially a suit by the defendant in the attachment, in the name of the plaintiff against the garnishee. In this suit, as against the garnishee, the plaintiff stands upon no higher ground than the defendant, and can acquire no greater right than the defendant himself possesses. In a case before the Circuit Court of the United States, Daniel, J., said: "The proceeding must be regarded as a civil suit, and not as a process of execution to enforce a judgment already rendered. In this proceeding the parties have a day in court; an issue of fact may be tried by jury; evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment:" *Tunstall v. Worthington*, Hempstead's R. 662; Drake on Attachment, section 452.

Garnishment also operates as an attachment or levy upon the effects of the defendant in the hands of the garnishee. It renders the garnishee liable for such effects, or their value, if they are not forthcoming to meet the judgment of the Court. And it has been held in several cases, that the garnishee will be personally responsible if the goods are taken from him by a wrongdoer; and this upon the ground that the garnishee may have his action of trespass against the latter: *Parker v. Kinsman*, 8 Mass., 486; *Dispatch Line of Packets v. Bellamy Man. Co.*, 12 New Hamp. R., 205.

Now, it would seem to be very clear upon general principles, that the Treasurer of the State having the control and custody of insurance funds and securities under an Act of the Legislature, can not be subject to any proceeding of this sort. If the garnishment operates in this case as in all others, to bind the effects, it is obvious that these securities may at any time be taken from the possession of the Treasurer to answer the demands of creditors. Judgment may be rendered against him for their value, if they are not forthcoming in obedience to the orders of the Court, costs adjudged; and executions and attachments issued to enforce obedience or secure payment. These results must follow, or the Courts must contrive, in some way, to divest the judgment in these cases of the operation and effect attaching to all other judgments in proceeding by garnishment.

The Treasurer may conceive it to be his duty to refuse obedience to an order of the Court requiring him to surrender the securities. How is the order to be enforced? Is he to be attached while in the discharge of his official duties, taken from his office, and detained in custody, for refusing to violate a trust reposed in him by the Legislature? He may decline to appear. Is the Court to hear proof of the amount or value of these securities, and order their delivery to one of the officers of the Court?

This would be to violate the whole purpose and intent of the statutes, and render them a delusion and a snare, instead of affording a security to citizens and residents of Virginia. By the express terms of the act, the Treasurer is prohibited from surrendering these securities until the liabilities of the company to the citizens of the State shall have been satisfied, or shall have terminated. It is easy to perceive that the whole legislative scheme may be defeated, and the law violated, if these securi-

ties may be subjected to the claims of every foreign creditor who may assert a demand in our Courts.

It is said, however, that none of these consequences can follow in this case, because the Andes Company have satisfied all their liabilities in the State, and the Treasurer is willing to surrender these securities under the order of the court.

I think it a sufficient answer to this to say, that we are not permitted to engraft exceptions upon the law to meet particular cases. The question must be decided upon general principles, and not with reference to the particular facts of this case, or the views and opinions of the Treasurer. Something more is involved than the rights and obligations of the Treasurer. It is a question that concerns the State. It is certainly not compatible with her sovereignty and dignity to be arraigned before her own tribunals, at the suit of individuals, in any other mode than is prescribed by her statutes. Nor is it consistent with her interests, nor the proper administration of public affairs, that her officers shall be arrested in their public duties, and required to answer before the courts for funds or securities committed to their custody for a specific purpose, under authority of a public law. The Treasurer of the State is one of the most important officers of the commonwealth, with grave, arduous and difficult duties to perform. It is impossible to foresee the mischiefs and embarrassments that will ensue, if, in addition to these duties, he is to be involved in the conflicts of creditors, to answer innumerable rival attachments, employ counsel, answer interrogatories, and otherwise consume time and attention which should be devoted exclusively to the public interests. I do not deem it necessary to cite the numerous authorities bearing upon this point. They are fully considered in *Drake on Attachment*, section 492 to 516 inclusive.

While there is some conflict of opinion in regard to the liability of municipal corporations and their officers to the process of garnishment, no case of acknowledged authority can be found which holds that the officers of a State can be made liable, by this proceeding, for funds in their hands, clothed with a trust under the authority of a public law. The Supreme Court of Massachusetts has announced the broad doctrine that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority: *Brooks v. Cook*, 8 Mass. R., 256; *Colby v. Coates*, 6 Cush. R., 558.

However broad this principle may be thus announced, there is peculiar force in its application to the present case. The Treasurer is required by the statute to retain the securities in the treasury for the special objects contemplated by the act, until the liabilities of the company are settled or terminated. So long as anything remains to be done, so long as these liabilities continue, he is expressly prohibited from disposing of or surrendering them. And when the Treasurer is satisfied these securities or funds are no longer required to meet any liabilities of the company in the State, he is authorized and required to deliver them to the company. This is the extent of his authority. His power and duty are fixed by the law. Now, whether this does or does not constitute a contract on the part of the State with the insurance company, it is the law for the Treasurer, fixing the measure of his authority and his responsibility. He holds the securities in trust, to be administered, first for the people of Virginia, and then for the company making the deposit. This is the distinction given them by the law, controlling not only the Treasurer, but the courts also; and it would seem there is no power, except that of the Legislature, to change such destination.

It was insisted, however, that in this way a foreign insurance company may effectually screen its assets from the just claims of creditors. The theory of this

whole legislation is, that a foreign insurance company may come into the State, deposit its funds and securities with the Treasurer, and carry on business here for an indefinite period. However long this may continue, the securities deposited can not be surrendered or subjected to the claims of creditors. If this exemption be wrong, if the State has improperly empowered a certain class of debtors to place their assets beyond the reach of creditors, the policy of this legislation is bad, and ought to be abandoned. But this is a matter which addresses itself to the consideration of the Legislature, and not to the courts.

In returning the securities to the company depositing them, the State complies with her engagements as expressed through her statutes. The foreign creditors have no just cause of complaint. As to them, the securities are in the same condition they occupied before the deposit was made. It is not to be presumed that an insurance company will permit its assets to remain in the treasury after it has ceased to carry on business in the State, merely to defeat the claims of creditors. If this shall be done, the State or the Treasurer would scarcely become a party to the fraud, and the company would no doubt be required to take possession of its property. Doubtless, upon the failure of any other remedy, the courts, ever alert to prevent and suppress fraud, would, in such case, assume jurisdiction and afford suitable relief. Nothing of the sort is pretended in this case, and no such question arises.

Upon the whole, in every view of the case, I am satisfied the judgment should be affirmed.

Judgment affirmed.

## BOOK NOTICES.

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*A Treatise on the Law of Damages, comprising their Measure, the Mode in which they are Assessed and Reviewed, the Practice of granting New Trials, and the Law of Set-off.* By JOHN D. MAYNE, of the Inner Temple, Barrister at Law. Second edition by LUMLEY SMITH, Barrister at Law. London. In one volume, 8vo. 1872.

The first edition of this able work was published in 1856. The author, then a rising barrister, had the advantage of the assistance of Professor Sedgwick's American treatise on the same subject. With this aid, the work was made very acceptable to the English lawyer, filling, as it did, a void in English legal literature, on a subject of daily use. One of the English law periodicals, "The Solicitor's Journal," pays it the compliment of saying: "An argument is seldom heard in the courts upon a question of the measure of damages without the work being referred to; and there are several points upon which there was, at the date of the first edition, either an absence or a conflict of authority, and upon which the views advanced by the author have since been held to be the law by the courts." This edition was reprinted in Philadelphia in 1857. The present edition is brought out under the auspices of another hand, Mr. Mayne himself having gone to India, where he seems to be enjoying an extensive practice. Mr. Smith, the new editor, adopting the plan made classical by Sergeant Stephen, in his Commentaries on the Laws of England, has sedulously preserved the original text, including his own additions in brackets.

Every lawyer knows the difficulties of the subject, partly inherent, partly growing out of the conflict of decisions made often under the peculiar exigencies of the case, without having the aid of any general and well-established legal principle. These difficulties have been greatly lessened by the work of Professor Sedgwick and the present work, for each has, to a certain extent, supplemented the other. The former dwelt, as was natural, more upon the American decisions, while the latter exhausts the English cases, with only occasional references to the rulings of our courts. With the two before him, the lawyer as well as the judge, finds his labors greatly lightened.

Upon a comparison of the two works, we think it will be found that they are good specimens of the different manner in which the English and American lawyer, of the better class, discuss a legal subject. The Englishman first exhausts the decisions which have been made upon a particular branch of his subject, stating the facts fully and fairly, and the conclusions of the court, and then endeavoring to reconcile them by finding out some common principle running through them, if possible,—often very intangible or refined. The American seeks first the principles which should govern, and then endeavors to show that the authorities are more or less reconcilable with it. It is both interesting and instructive to examine and compare the two together. Upon the English plan no treatise could be better done than our author's, and the book itself is so handsomely gotten up that it is a luxury to read it.

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We have received from the publishers, Baker, Voorhis & Co., Law Publishers, New York, the sixth edition of Sedgwick on Damages. As the legal profession is familiar with the text of this work and knows its merits, it is deemed unnecessary to

review it. The subject of which this work treats, is one that is being constantly added to by the continual developments of the principles of the Law of Damages; either by the adjudication of judicial tribunals, or statutory provisions. The object of a new edition is to give the profession the benefit of such changes, modifications or extensions of the principles of the work, as may have been made since the issuance of the previous edition. Without this, the edition will want that superior excellence that should recommend it to the profession. Tested by this, we see very little in the sixth to make it more meritorious than the fourth and fifth editions. The notes, as a rule, are simply digests of cases that sustain the principles enunciated in the text; and, therefore, can not be said to have added very greatly to the wealth of the principles of the law of damages. A simple reference to the cases would have answered every purpose that the editor has proposed to attain by the extended notes, or to speak more correctly, his full digest of the decisions. There is a great distinction between the digest of a case, and the enunciation of a principle by an author, with references to decisions to sustain such principle. We are of the opinion, that there is not so much merit in the number of new cases cited, as there is in that discriminating knowledge that refers the profession to cases that modify or extend the principles of the law. And many of the modifications and extensions of the law are effected by statutory provisions; and the work bears no great evidence of diligent search for changes in the principles of the law in this rich depository of the laws. The law of principal and surety has been materially changed in Tennessee by statute, giving the surety right of action against his principal and co-sureties the instant judgment has been obtained against him, without first requiring the payment of the debt; and yet, under the head of principal and surety, no reference is made to such changes. And references to recent cases are rare. It is well known that there have been rich developments in the law of damages in the last few years, especially in regard to questions of tort, produced by the events of the late war and the multiplication of great corporations that possess the country. And yet the notes of the editor on the recent decisions that bear on the law of torts are meagre and unsatisfactory. More ample notes on this subject would have added greatly to the value of the sixth edition. 2

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*The Doctor and Student: or Dialogues between a Doctor of Divinity and a Student on the Laws of England. Containing the grounds of those laws, together with questions and cases concerning the equity thereof.* Revised and corrected by WILLIAM MUCHALL, Gent. To which are added two pieces concerning suits in Chancery by subpoena. 8vo., pp. 401. Cincinnati: R. Clarke & Co. 1874.

Prof. Wm. G. Hammond, of St. Louis, communicates the following criticism of St. Germain's Doctor and Student to the Central Law Journal, which we gladly reproduce as our own estimate and criticism of that celebrated work:

"If we were asked to name one treatise on English law of more interest than any other in the long series that extends through the seven centuries from Glanvil to our own day, with reference to the development of that law and the history of legal doctrine, we should certainly select 'The Doctor and Student.' Bracton is no doubt more instructive upon the origin and first forms of the common law; Coke's First Institute covers a wider field, to say nothing of Blackstone and other modern writers

upon the entire system. But, as marking an epoch in the life of the law, and throwing light upon the modes of thought and reasoning, upon the accepted principles and the unconscious tendencies of doctrine, no one of them seems better worth the careful study of a scientific lawyer than the modest little dialogues of St. Germain. It is no credit to our profession that it has of late years passed so completely out of use as to become one of the rarest of law books. Its title was kept familiar to the profession by two or three well-known quotations, but many of our younger members of the bar will no doubt see it for the first time in this neat edition.

The work was first printed in 1523 (not 1518, as erroneously stated in the preface), and its early repute may be judged from the fact that it went through no less than seventeen editions before the end of 1787. From that time we believe there has been but one printed in England, in 1815, and that, like the present, was a *verbatim* reprint from the edition "revised and corrected by William Muchall, Gent.," in 1787. Muchall showed a good taste, none too common in his time, in leaving the fine old English of the author's own day unchanged (except in spelling) as he found it in the earlier editions; and to the lovers of good idiomatic sixteenth-century English this handsome reprint will have scarcely less interest than it has for the professional reader. Between the two classes of readers we may hope for a demand which at no far-off day will give us a well-edited critical edition, such as European lawyers love to bestow on their legal classics. The present notes (from Muchall's edition) are of the most trivial kind. But if some of the accomplished lawyers, who are now busy with the improvement of our law by importing all kinds of novelties from other systems, would spare a little time to study the history of our own, and embody the results in appropriate notes to books like this, upon such topics as we have already referred to in speaking of the value of the work, they would indeed be "visiting and strengthening the roots and foundation of the science itself," in the impressive words of Lord Bacon.

So we can not help thinking that if Lord Holt had spent the same labor in illustrating and extending the excellent sketch of the law of bailments (Dialogue 2, chapter 38) that he did in importing cumbrous Latin phrases and fragments of civilian doctrine in his famous opinion in *Coggs v. Bernard*; and if, comparing this work with Bracton, he had shown the remarkable development of the common law on that subject, instead of going back to recast the law of his own day into the form of those sources from which Bracton borrowed—in that case our law of bailments would be far simpler, more harmonious, more logical, than it is at present. Other passages to illustrate the same point may be found almost at random through the work. The discussion of a lawyer's duty in cases of doubtful morality (pp. 115-121), of the duties of executors (pp. 128-135), of the origin of uses (pp. 165-175), of the consideration of promises (pp. 174-181), of ignorance of law and fact (pp. 248-255), are exceedingly instructive, and would repay careful annotation, showing by what regular and logical processes the law of our own day has for the most part been developed from purely indigenous sources. We have no space for extracts, but must quote a brief one from the chapter first above referred to, because it states in the most distinct and pithy form a doctrine to which our highest courts have but recently returned, after a long conflict and confusion of decided cases, as to the right of a carrier to limit his liability by notice or contract:

"And if (the carrier) would percase refuse to carry it, unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like. And all these diversities be granted by secondary conclusions derived upon the law of reason, without any statute made in that behalf. And, per-

adventure, law and the conclusions therein be the more plain and the more open. For if any statute were made therein, I think verily more doubts and questions would arise upon the statute than doth now when they be only argued and judged after the common law." (p. 221.)

Even for the mere practitioner, who cares for nothing in any book except the quotable "points" that may be used to garnish a brief, "The Doctor and Student" has its own value. It abounds with pithy, clear expressions of those fundamental doctrines of the common law which have been so long recognized that it is almost impossible to find a modern decision affirming them, or a modern treatise expressing them in their original form—e. g., that the heir or next of kin, as such, shall have no meddling with the goods of deceased (p. 225); that the essence of a consideration lies in the charge to the promisee, not in the profit to the promisor (p. 177); that no prescription in lands maketh a right (p. 27); that no manner of chattel, neither real nor personal, shall, after the law of the realm, descend unto the heir (p. 137). True, these are mingled with a great deal of obsolete matter—questions about fines and entails, villeins and nefs, abbots and courts christian. Mr. Muchall was careful to note all that was obsolete in his day, but we are thankful that he did not venture to omit it, for many of these passages are the most valuable in the book to a thorough student. The work, as a whole, its purpose, method, spirit and effects, will be seen as much in these chapters as in those of modern application. The author's purpose in writing such a work is of itself a question of much interest, and worthy a careful examination. But we have already far exceeded the proper limits of a notice.

Messrs. Robert Clarke & Co. have produced the volume in a handsome dress, with clear white paper and an open, legible page. But the proof-reader has been very careless."

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*A Manual of Medical Jurisprudence.* By ALFRED SWAYNE TAYLOR, M. L. F. R. S., and Professor of Medical Jurisprudence and Chemistry in Guy's Hospital. Seventh American edition, by John J. Reese, M. D., Professor of Medical Jurisprudence and Toxicology, in the University of Pennsylvania. Henry C. Lea, Philadelphia, Publisher.

It requires but little reflection to discover that the production of such a work as the above necessitates great labor and talent of no ordinary character. When it is considered that the knowledge requisite to the production of such a volume comprises medicine, with all its collateral sciences, and in addition the application of this knowledge to the purposes of the law, some notion of its extent and variety may be formed. In the words of our author, "Medical Jurisprudence, or as it is sometimes called Forensic, Legal or State Medicine, may be defined to be that science which teaches the application of every branch of medical knowledge to the purposes of the law; hence its limits are the requirements of the law on the one hand, and on the other, the whole range of Medicine. Anatomy, Medicine, Physics, Physiology, Surgery, Chemistry and Botany lend their aid as necessity arises, and in some cases all these branches of science are required to enable a court of law to arrive at a proper conclusion on a contested question, affecting life or property."

It will be observed by students of medical jurisprudence, that the lending of the physician's knowledge to the aid of justice, though allied to, is quite different from

its application to the cure of disease. Thus, a medical witness may be asked if a contused wound was caused by a blunt instrument in the hands of an assailant or was produced by a fall, a question of no possible moment in the treatment of the injury, or he may be required to state from the revelation of an autopsy, if a dead infant had ever breathed. It would be difficult to imagine how the knowledge, requisite to give a correct answer to such a question, could ever be applied to the alleviation of suffering, the proper office of a physician, yet the hopes of expectant heirs at law might rise or fall upon the application of the hydrostatic test.

In fact, medical jurisprudence can not properly be regarded as an outgrowth of the profession of medicine, with which every physician is expected to necessarily know, but constitutes a great science in itself, requiring, and worthy of, the highest talent. The vast range of its inquiries is sufficient to satisfy the most ardent love of knowledge, while the discrimination and judgment necessary to their application to the law requires reasoning powers of the first order.

Having for its end the attainment of justice and affording exercise for all the faculties of the mind, one would naturally expect that its temples would be thronged, and its altars surrounded by ardent votaries, but the difficulty lies in the fact that the pursuit of such knowledge offers no pecuniary reward, the student must content himself with the fame he may acquire, and the reflection that the result of his labors will prove a Nemesis to the criminal, while it will throw around the innocent and unfortunate the strong arm of the law. Thus it is, that men, who might be shining lights in such studies, impelled by the strong necessity of gaining bread, turn to more profitable, if less alluring, pursuits.

Our author seems to have been fortunate in being able to pursue those studies which were most attractive to him, for, judging from the manner with which he handles his subject, he has devoted no inconsiderable time to its elaboration.

For the authenticity of the facts of science, adduced in this work, the name of Professor Taylor is a sufficient guarantee to the novice in such knowledge, while the power of thought displayed in their application, and the arguments in which he shows the error of parts of the English law relating to forensic medicine, commend itself to every logical mind.

*The Rule of the Law of Fixtures.* By ARCHIBALD BROWN, of the Middle Temple, Barrister at Law. London: Stevens & Haynes. In one volume, 8vo. 1872. Second edition, incorporating the principal American decisions.

"The Rule of the Law of Fixtures" is, says our author, an attempt to gather up in *one manageable formula* all the numerous factors and elements requiring to be considered in advising upon modern cases. Any lawyer at all familiar with the subject will appreciate this herculean attempt. The idea of embodying all the "numerous factors and elements" of the subject of fixtures into "one manageable formula," is an effort to bring chaos into unity, which deserves, if it does not win, success. That the author has succeeded we are not altogether bold enough to assert. But we think he has very successfully accomplished the second object he had in view. "It also attempts," he continues, "to arrange these factors, or elements, in the order of their relative importance." This he has done admirably, starting out upon the basis of the earliest English cases, *more Anglice*, and building only with the materials furnished by the later cases. Upon any other plan the whole superstructure, we fear,

would topple over. But thanks to the strict adherence of the British judges to precedent, and the nice distinctions which they make in order to save the precedent, the edifice stands a marvelous evidence of the power of the Anglo-Saxon intellect to blend into an apparent whole the heterogeneous elements produced by good hard sense applied to an infinite variety of particulars, without much reference to abstract principles, or much respect for logical coherence.

The book is, however, an admirable one, making proper allowance for the plan. It is a work that would make a civil juriconsult, like Pothier or Savigny, marvel, as the learned Hottomon over Littleton on Tenures, at its, to them, "recondite, inconsequent," and even "absurd" logic. But it is a good and very sensible and readable book to the practical and common-sense English and American lawyer. It takes up a difficult subject, begins at the very beginning, tracing the decisions in the order of time, and showing how they gradually extended a principle here, then another there, until finally a system is built up, somewhat incoherent, but good enough for all practical purposes, and enabling the lawyer, to use our author's words, "to advise upon modern cases." We have read it with much zest, and greatly admire it.

A year or two ago we had occasion, in the discharge of judicial duty, to look into one branch of the subject of fixtures, and we gave the result of our studies to the public in the second number of this Review. That branch was the law of fixtures in relation to buildings. We found the law to be in a distressing state of uncertainty, partly from the variety of forms in which the improvements may be made, and partly from the different application of the same rules between parties standing in different relations to each other. Our effort, in the conflict, was to strike upon a principle on which to stand; for, when decisions run counter to each other, the only stable ground is the principle which underlies them. We thought we had found good standing ground by considering buildings either as chattels, as they may be in certain cases, or as dependent for their character as fixtures or not fixtures by the intention of their erection. "The recent decisions," we said, "lay little stress, except where the erection is obviously a mere chattel, upon the mode of attachment to the soil, and more upon the relation of parties, the intention with which the buildings are erected, and the uses to which they are put."

The result of our author's rigid analysis of the actual decisions is substantially the same. He thinks the rights of parties depend principally upon—1, annexation to the freehold; 2, contract, which is not a common law element; 3, derivative rights, the consequences of certain derivative relations which have come (in whatever way) to be vested in and established between the parties. "The method or measure of the annexation," he says, "is the least fertile and least important of all the three considerations. It is also so very liable to be overruled in its effect by the one or the other of the two sub-divisions of the first part of the rule, or even (although less often) by one or the other of the two of the other subsidiary considerations themselves, as to afford very little (or rather almost no) solid basis for arriving at an opinion, or for forming a decision in the matter." (p. 48.) The derivative rights he treats elaborately by a review of all the recent decisions, without himself deducing any principle, but the principle underlying which springs from the use for which the buildings is erected in connection with the relation of the parties.

This book is beautifully printed, with side notes to direct attention to the matter under discussion. We can recommend it as being an exhaustive compilation. If you are not satisfied with the author's structure, you will find all the materials to build one of your own, arranged upon a plan which, if not a good, is certainly an intelligible one.

*A Treatise on the Law of Contracts, and upon the Defenses of Action thereon.* By JOSEPH CHITTY, Jr., Esq. The Ninth English Edition: By JOHN ARCHIBALD RUSSELL, Esq., LL. B. The Eleventh American Edition: By J. C. PERKINS LL. D. In two volumes. New York: Hurd & Houghton. 1874.

Any criticism of the body of this work may be now deemed superfluous. It is unquestionably, as Mr. Perkins, the able editor of this the eleventh American edition, states, "noted for the pre-eminent clearness and accuracy with which it states the principles that are established by the cases; for the ease and readiness with which it may be consulted, and for the fullness, pertinence, discrimination and reliability of its citations." It is, in our opinion, the ablest work on contracts yet extant, and well deserves the high encomiums pronounced upon it by many of the most distinguished of English and American jurists. That able lawyer and elegant and graceful *littérateur*, Samuel Warren, in his "Law Studies," pronounces it certainly the best practical work on the subject of which it treats, and advises the purchase of it at an early stage of legal study. Chancellor Kent, also, writing of an edition of it published in 1834, praises it in equally high terms. The work began with a volume of about 300 pages. In passing, however, through nine English and eleven American editions, it has been increased "by the introduction of new developments in the law, new principles established, and an accumulated citation of more recent decisions, to such an extent that two volumes, containing more than twice the original number of pages in each, have become necessary to meet the demands of the times in the study of the law of contracts." The American editor tells us, in his preface to this edition, that "three editions of the work have been issued in England since the last (being the tenth) American edition was published. The enlargement of the text in these editions, and the other changes made in it, have created a necessity, and opened the way for a corresponding extension in the range of the notes to be introduced into this eleventh American edition. The editor has consequently introduced many new notes, entirely recast many, enlarged others, and revised the whole, as the text seemed to require; and in order to adapt the book more fully to American study and practice, he has introduced into the text, with proper marks of distinction, such additions of new matter as have been deemed suitable for that purpose."

The chapter on the subject of "Specific Performance," which is an entirely new feature contributed by the American editor, we find, after a careful reading, "full and exhaustive."

The references, in the foot notes, to American cases, in which the principles announced in the text have been sustained or modified, or dissented from, are very many, and include, we believe, all of the most important. The index has been carefully arranged, and enables one with great ease to find almost any question to which he may wish to refer. The paper and type used, and the binding, are first-class.

*An Epitome and Analysis of Savigny's Treatise on Obligations in Roman Law.* By ARCHIBALD BROWN, of the Middle Temple, Barrister at Law. London: Stevens & Haynes, 1872.

This thin volume of one hundred and fifty pages, undertakes to give us an epitome and analysis of Savigny's learned work on obligations. There could be no greater contrast than the chain of reasoning shown in this epitome, and the chain of reasoning developed in Mr. Brown's own Work on Fixtures. In the latter, as we

have just seen, the author attempts, after a thorough review of the decisions in the order of time, to evolve a rule. Savigny, on the contrary, commences at the rule, or elementary principle, and follows his subject, in all the logical sequences, to its ultimate ramifications. The one makes the tree of science by gathering all the branches and trying to unite them by a common root. The other by commencing with the seed, and allowing the tree to grow naturally. Both are admirable specimens of these different plans of operation. A young law student could not spend a few days more profitably than by reading these two books together, and contrasting them. It will give him a better idea of the radical difference between the mode of treatment of legal subjects by a learned civil law jurist and an able common lawyer, than he could acquire in the same time in any other way.

The analysis of Savigny's work is very good. But it is more satisfactory to an experienced lawyer than to the student. It requires familiarity with the subject, and with the mode of treatment of legal questions by civilians, to fully comprehend it. Without the aid of the admirable reasoning of Savigny himself, many of the positions which the Analysis shows him to take, are not only not self-evident, but can not be fully grasped. As Froude says of many of the axioms of Spinoza, upon which he builds his great work, they are only axioms to those who have become familiar with the train of reasoning, which leads to them. The Treatise itself is an admirable production, more complete, though not more perfect, than the work of Pothier. It has been translated in full into French, but not into English.

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*The American Corporation Cases: Embracing the Decisions of the Supreme Court of the United States, the Circuit Courts of the United States, and the Courts of Last Resort in the several States, since January 1, 1868, of questions peculiar to the Law of Corporations.* Edited by THOS. F. WITHROW, late Reporter of the Supreme Court of Iowa. Vol. II. Municipal Corporations. Chicago: E. B. Myers, Publisher. 1874.

The editor, in the first volume of this series, stated his design to be to collect all of the American adjudications in courts of last resort of questions peculiar to the law of corporations, and announced since the 1st day of January, 1868. Volume I. contained cases relating to private corporations solely. The present volume is devoted exclusively to municipal corporations.

The head-notes to the cases reported in this volume seem to have been prepared with care, and this is about the extent of the editor's labors so far as we are able to judge. We think had Mr. Withrow prefixed to each case, or at least to the most important, a note collating the authorities for and against the principles announced, tracing the current of authority thereon in this country and in England (like Mr. Bigelow, in his admirable collection of Life and Accident Insurance Reports), the favor done the profession would have been much greater.

The volume is a splendid specimen of tasty, handsome binding and mechanical execution, and reflects great credit upon the publisher.

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*Broom's Legal Maxims: A selection of Legal Maxims, classified and illustrated.* By HERBERT BROOM, LL.D. Seventh American from the fifth London edition.

We are indebted to the publishers, T. & J. W. Johnson, of Philadelphia, for a copy of the above work, which is bound and printed in the most approved style. Of its

merits it is hardly necessary, at this late day, to speak. Since its publication, nearly thirty years ago, it has passed through five editions in England, each addition having been carefully revised by its learned author.

In pronouncing it an indispensable book to the law student and to the practitioner, we merely re-echo the commendation of the profession in England and America. Although the American references are comparatively few, yet we doubt not but that they have been carefully selected from the multitude of cases that might have been cited.

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*The Code of Civil Procedure of the State of Ohio, with the subsequent Amendments, Supplementary Acts, and Statutes Regulating the Practice, with Notes of the Decisions of the Courts of Ohio.* Second edition, revised and enlarged by GEO. E. SENEY. Cincinnati: Robert Clarke & Co., Publishers. 1874.

The author of this work tells us that it has been "more than thirteen years since the publication of the first edition. During this period numerous changes have been made in the Code of Civil Procedure, by amendment, also by supplemental and other statutes. The courts of Ohio, during this time, have settled by their decisions many questions under the Code. These changes and decisions are found, amid other matter, in seventy volumes of Statutes and Reports. These volumes are not, at all times, within reach, and when they are, each one must be carefully examined before one can feel satisfied that he has seen all that can influence the decision of his case. This volume is intended to save the time and labor required in making such examination. It presents a complete copy of the Code of Civil Procedure, as it now stands, with notes of all the judicial decisions in Ohio, which in any way influence its construction. These notes follow immediately the particular section of the Code to which they relate."

The value of the work can be seen at once. Its mechanical outfit reflects credit upon the publishers.

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We return our thanks to S. B. Griswold, Law Librarian of New York State Library, for a copy of the Fifty-sixth Annual Report of the Trustees of the Library. At the close of the year 1873, the whole number of volumes in the Law Library was 24,634. During that year the number added was 1,120. We notice that all the legal periodicals of this country are subscribed for. This should be done by all the State Libraries. We believe that the State Library of Tennessee has on its shelves not one of the many able legal journals published in the United States, except this REVIEW.

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We are indebted to Messrs. Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, London, for a little volume of eighty pages, entitled "An Epitome of the Leading Common Law Cases; with some short notes thereon; chiefly intended as a Guide to 'Smith's Leading Cases.'" Second edition. By JOHN INDERMAUR, Solicitor. (Clifford's Inn Prizeman, Michaelmas Term, 1872).

*The Law of Negligence; being the First of a Series of Practical Law Tracts.* By ROBERT CAMPBELL, M. A., Advocate (Scotch Bar), and of Lincoln's Inn, Barrister-at-law, late Fellow of Trinity Hall, Cambridge, London: Stevens & Haynes, Bell Yard, Temple Bar.

This short, but interesting essay, was composed, as the author tells us, in the form of lectures or readings for pupils, to relieve the dryness of their studies on the law of real property. The author's endeavor was to awaken interest by reviewing the latest phase of judicial opinion on a familiar subject, and at the same time by digesting and harmonizing the law relating to that subject, so that new decisions might seem to illustrate old principles, or that the extent and direction of the change introduced by each decision might be correctly estimated.

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We have received from the publishers, Messrs. William Gould & Son., of Albany, N. Y., an account, in pamphlet form, of the trial of Emil Lowenstein for the murder of John D. Weston, at West Albany, Aug. 5th, 1873, containing the evidence, arguments of counsel, charge of the Court, etc., without condensation.

This book is principally valuable for the very able argument of the District-Attorney, Mr. Moak, who gave quite a full resume of almost all the latest authorities on questions of circumstantial evidence. Practitioners in Criminal Courts will find much to interest them in this volume.

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*Reports of Cases Argued and Determined in the Supreme Court of Ohio*, by MOSES M. GRANGER. New series, Vol. XXIII. Cincinnati: Robert Clarke & Co. 1874. Price \$2.50.

We find several opinions in this volume which, if our space allowed, we would call attention to. We have only space, however, in which to express our astonishment at the success of the publishers in getting out a work so accurately and admirably done as this at the exceedingly low subscription price asked for it.

## NOTES.

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### VALIDITY OF THE NOTES OF THE BANK OF TENNESSEE, ISSUED SINCE THE 6TH OF MAY, 1861, AND KNOWN AS THE "NEW ISSUE."

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We give below the argument of JOHN REID, Esq., of counsel for defendants, and representing the depositors, in the case of the *State of Tennessee v. Samuel Watson, Treasurer, et al.*, delivered before the Supreme Court at its last December Term. As the Court has not yet delivered an opinion in this case, and as the questions discussed will, doubtless, prove of great and general interest to the profession, we give the argument in full.

MAY IT PLEASE YOUR HONORS:

The principal question, in this cause, discussed before this Court at its last term, was different from the question now before the Court. It was this: Had the assets of the Bank of Tennessee been rightfully seized by the Legislature as a part of the common school fund, or were the said assets a trust fund, which the bank must hold for the benefit of its creditors. That was then the principal question. The principal question now to be discussed is the validity of the circulating notes of the Bank of Tennessee, issued since the 6th of May, 1861, and known as the Torbett money or "new issue." The point is distinctly raised in the amended answer and cross-bill of B. R. McKinney and others, as the Court will see by reference to pages 119 and 120 of the printed record.

And allow me, also, to say, that the parties litigant no longer occupy the same relative position as in the former discussion. The State and the depositors in the bank are now no longer in antagonism, but stand upon the same platform and fight shoulder to shoulder in this contest. On the other hand, the holders of these circulating notes, issued since the 6th of May, 1861, and the depositors in the bank now no longer fraternize and fight side by side, as they did in the former discussion, but stand face to face as enemies. The State and the depositors insist that these circulating notes, which were issued by the Bank since the 6th of May, 1861, were made for an unlawful purpose, and were void in their inception and are now void. On the other hand, the holders of the "new issue," as it is termed, insist that it was lawfully made and issued, and that they, the holders thereof, under and by virtue of the Act passed 6th of February, 1860, section 30, are entitled to the preference in payment over all other creditors of such bank. The assets of the Bank, according to the evidence of the Trustee, (Samuel Watson), will realize, in any event, considerably less than a million of dollars, and the amount of these circulating notes which were issued since the 6th of May, 1861, will perhaps, or did, exceed one and a half millions of dollars. (See exhibit C. and D., to Watson's deposition, on pages 178-9, of printed record.) So then, if this "new issue" be valid and binding upon the Bank, it is manifest that the holders thereof, will not only consume all the assets of the Bank, but the people of this State will have to be taxed, and perhaps upwards of \$500,000, to pay the remainder. I think it possible, if the exact amount

could be ascertained, that the "new issue," now outstanding and unpaid, would come nearer to one million five hundred thousand dollars. Of course, then, as I have already stated, the State and the depositors stand upon the same platform, and are equally interested in disputing the validity of these circulating notes, known as the "new issue."

The Chancellor in the Court below (Fleming), decreed that these circulating notes were valid, and must be paid in preference to the other debts, and the State and the depositors have appealed from his decision to this Court.

In discussing this question I wish to say in the outset, that I have always thought that, in any case, it was unjust to give a preference in payment to the holders of the circulating notes of a bank over the general depositors. It has always seemed to me to be hard that the law should take *the very money* which had been placed in the Bank by its depositors, and give it to the holders of its circulating notes in preference to, and to the exclusion of, those who had placed it there. Some of these deposits belong to minors, and to other persons not *sui juris*; some are but the sweat of blood of honest toil and painful self-denial; and some belong to others who are guiltless of any wrong. And allow me to say, also, that general deposits in a bank ought to be encouraged as a matter of public policy; because upon these deposits the usefulness of a bank to the community at large, in a great measure, depends. It is true, that, in contemplation of law, a general depositor is but a creditor of the bank; that when money is so deposited it becomes the money of the bank. But what more is the holder of its circulating notes? However, it is useless to dwell upon this point. "*Ita lex scripta est*," and to it I bow in submission. But whilst I do so, the right will be assuredly conceded to me to demand of the other side proof, not only that they are *bona fide* holders, but also that the circulating notes so held by them are legal and valid according to the strictest letter of the law. Do not "show me the steep and thorny way to heaven" unless you are prepared to "reck your own reed," and to follow what you preach; do not point me to the law when it is against me unless you are ready to submit to the law when it is for me.

Having said thus much, let us now, before commencing the argument, understand the circumstances under which, and the purposes for which, this "new issue" was made. And I here state, in the outset, that this "new issue" was created to aid and assist the State to throw off its allegiance to the Government of the United States. I care not to whom these circulating notes were paid out, nor for what consideration they were so paid out; I go behind their issuance and insist that their creation was illegal.

It is well-known to this Court, that the Legislature of this State, on the 6th of May, 1861, passed an act entitled "An Act to raise, organize and equip a provisional force and for other purposes." It is well-known to this Court, also, that, on the day thereafter, a league between the State of Tennessee and the Confederate States of America was made, by which the whole military force of the State, during the impending conflict with the United States, was put under the control and direction of the President of the Confederate States of America, as fully as if the State of Tennessee were then a member of the Confederacy. By the 9th section of said Act, the title to which I have just given, the Governor of this State was authorized to issue and dispose of the bonds of the State to the amount of five millions of dollars, the proceeds of which were to be used in arming and equipping the troops of the State. Now, all these facts are admitted in the additional agreement, and made a part of the record in this case, and if they had not been so admitted, still they form a part of the history of this State, and, as such, will be judicially known to

this Court. Well, these bonds were so issued, and were either sold to the Bank of Tennessee, or were deposited with said Bank to the credit of the Military Board, with the understanding and agreement that the said Board should draw upon the Bank for their amount, and to enable the Bank to meet the drafts of the said Military Board, this "new issue" was necessarily created. But for this agreement or understanding between the Military Board and the Bank of Tennessee, the "new issue" would never have been created.

Samuel Watson (the Trustee of the Bank and one of the complainants in this cause), tells us in answer to questions in chief, Nos. 2 and 3, (and to be found on page 173 of the printed record,) that the amount of the Tennessee eight per cent. war bonds now held by the Bank is \$3,223,000; that the whole amount of these bonds taken by the Bank was \$3,800,000, but that a part had been sold by the Bank and leaving still in the hands of the Bank the amount already stated; that the said bonds were placed to the credit of the Military Board on the books of the Bank; and that up to and including the 31st of August, 1861, the Military Board had drawn out of the Bank \$4,195.54 more than the \$3,800,000 of the war bonds which had been passed to its credit on the books of the Bank, as before stated.

But the facts, which I am now endeavoring to lay before this Court, are more clearly and succinctly stated in the agreement between the parties, an extract from which I will now give, and which is in the words following:

"It is agreed that the said books and proceedings show that the purposes of the said Military Board were the arming and equipment of troops, and the purchase of military stores, in the war then flagrant between the United States Government and the Confederate or Rebellious States, and that the sums of money appropriated by them and paid by checks on the Bank of Tennessee, were used for the purposes aforesaid, and in payment of the salary of the Military Board, and its Secretary and other officers.

"It is further agreed that G. C. Torbett was the President, and John A. Fisher the Cashier of the Bank of Tennessee during the year 1861, and that they are now both dead; *that they and the other officers and Directors of the Bank of Tennessee knew that the Military Board was organized for the purpose of raising, arming and equipping troops and furnishing military stores and supplies in aid of the rebellion then flagrant against the United States Government, and that the money drawn from the Bank upon the order and checks of said Board was to be used, and was used, for the purposes aforesaid.* That the ordinary and then issues of circulating notes of the Bank of Tennessee, and its branches, were insufficient to meet the usual banking business of the Bank in 1861, and drafts or checks drawn upon the Bank by the Military Board, and that the Bank was compelled in order to meet its regular business and the demands of said Board, to resort to the issuance of the Bank notes now in controversy known as the 'new issue' of said Bank, and that said notes, constituting the 'new issue,' were all put into circulation after the 6th of May, 1861, and for the purposes aforesaid."

And so it appears, incontrovertibly, that the President and Directors of the Bank of Tennessee, well-knowing that the old issue was insufficient in amount to enable it to accept and pay the checks of the Military Board, and well-knowing that the money to be advanced would be applied by the Military Board, in arming and equipping the troops of the State to fight against the troops of the United States, yet nevertheless, resolved to make, and did make, this 'new issue' with the view of helping and giving aid and comfort to the State in the impending struggle."

But it may be said, and doubtless will be said, no;—that it does not necessarily follow that the Bank so agreed to do; *to help and give aid and comfort to the enemy of the United States; that all the facts I have stated may be as I have stated them,*



and yet the Bank may have bought the said bonds of the State, if it ever did buy them, or may have accepted and paid the checks of the Military Board, if it only loaned the money to the State, by way of a speculation, or only in the way of its ordinary business. The word necessarily, is, I admit, a very strong word, but I insist, if the facts be as I have stated them, then the inference I have drawn therefrom is highly probable, and sufficient for us to act upon as true. It must be recollected that the Bank of Tennessee was a State institution, the stock in which was owned solely by the State. It must be recollected, also, that the President and Directors were officers who were nominated by the Governor and confirmed by the General Assembly, and that they continued in office but for two years. Of course, then, under such a state of things, as long as human nature continued to be as it was and is, there would exist between the authorities of the State and the officers of the Bank, the most perfect sympathy and accord. When the authority of the State took snuff, the officers of the Bank would probably sneeze. I say this would probably be the case, even in ordinary times. But in the extraordinary times of which we speak—when the heart of the whole people was moved as it had never been moved, and when this very proposition of furnishing the necessary money to arm and equip the troops of the State, *was a question of life or death to the struggle*, of course the President and Directors of the Bank would either act heart and soul with the authorities of the State, or would throw up their offices and refuse the aid asked, according as they were in favor of, or against the sundering of the State from the United States. To say that the Bank, under such a state of things, may have bought the bonds of the State, or accepted and paid the checks of the Military Board, merely as a speculation, or as a matter within the line of its legitimate business, is but empty sound, or the talk of a child and needs no refutation.

But I go now to add other facts, which tend to show that the officers and the managers of the Bank did, by making this "new issue," *intend thereby* to give aid and comfort to the State in the then impending struggle.

It is admitted in the written agreement, drawn up by Mr. Trimble and signed by Mr. Baxter, and made a part of the evidence in this cause, that the officers of the Bank, at the time, sympathized with the authorities of the State in the struggle then about to take place with the Government of the United States. It also appears, and being a part of the history of the State would be judicially known to this Court, that the officers of the Bank, immediately upon the fall of Fort Donelson, not only fled from their homes in this State to within the lines of the Confederacy, but remained there during the war, and removed with them the assets of the Bank from its banking house at Nashville. It also appears from the printed record, that these same officers actually issued \$177,000 in the circulating notes of the Bank, after the assets of the Bank had been so removed from its banking house at Nashville. (See exhibit D. to Watson's deposition, page 179, of printed record.)

Why should these officers have fled from their homes on the approach of the Federal army, and have remained out of the Federal lines during the war, unless they had cast their lot with that of the Confederacy? Or, why should they, who were mere naked trustees, and who were not bound, either by their duty or by the law of the land, to remove these assets from the banking house at Nashville, do so, unless to enable the State to continue to provide for its troops? Or, why should these same officers assume the responsibility of issuing and paying out so large an amount of money after the assets of the Bank had been so removed, unless to give aid and comfort to the State in the struggle against the United States? The Bank did not then owe the State, but, on the contrary, the State at that time was largely indebted to the Bank.

It is, as it seems to me, manifest to a mind open to the truth, that the Bank, from the beginning, acted in accord with the authorities of the State. *I do not, however, consider that this accord must be proved by us to have existed. On the contrary, I think its existence will be conclusively presumed in cases of this character, from the bare knowledge of the use to which the money would be applied.*

And so having thus stated the material facts, as I understand them, let me now, also, refer to what may be deemed material evidence by the other side. It is the evidence taken in the case of the *Bank of Tennessee v. R. H. Jamison*, administrator, and others—a case tried in the Circuit Court for Maury County, but the evidence in which was made a part of the evidence in this cause by consent of parties. Watson (the trustee), in answer to the third question, says:

“The evidence that the books of the bank show is, that the notes issued after the 6th of May, 1861, were issued and paid out in the regular course of business, and that they were entered upon the books as all former issues of the bank had been. And there is nothing in the account books or records of the bank showing that they were paid out in aid of the rebellion or that they were not paid out like all issues of the bank.” (See page 140 of the printed record.)

And in answer to the next succeeding question, he says:

“The books show no evidence that said bank notes were received by any person or persons with any knowledge that they were issued and paid out in aid of the rebellion.”

It is as well to state here as elsewhere, that the evidence of Mr. Watson amounts to nothing when sifted and when what is material is understood. He had no connection with the Bank in 1861 when these circulating notes were issued, and knows no more about the causes which prompted their issuance than any other citizen—no, not half so much, if his answers are to be taken as the full expression of his knowledge. He simply says, that the *books of the Bank do not show* that these circulating notes were *unlawfully issued or that the first takers knew that they were illegal*. No, indeed; and they would be very garrulous books if they showed either fact. And yet it is distinctly admitted in the agreement, which I have already quoted, that these circulating notes *were issued* to enable the Bank to meet the drafts of the Military Board drawn upon the Bank, and known to be so drawn for the purpose of arming and equipping the troops of the State.

Granville C. Torbett was the President of the Bank of Tennessee, at Nashville, and H. L. Claiborne was one of its clerks. They both tell us that the issuance of the “new issue” was regular in form, and according to the rules of the Bank; but neither of them tell us why, or for what purpose this new issue was made. Mr. Claiborne distinctly admits his ignorance, telling us that he was not a member of the Board and never present at its meetings, and, therefore, could not know the cause of the making of these notes. (See his answer to the last question put to him on page 141 of printed record.)

Colonel Torbett could have told us but did not, and thereby strengthens the conviction that they were made in aid of the rebellion.

Now, this was all the evidence given by officers of the Bank at Nashville. The depositions of the President and Cashier of the Branch Bank at Columbia were also taken, and I will now quote from them.

Mr. Dunnington (the President) says as follows: “They (the circulating notes, or ‘new issue,’ of the Branch at Columbia) were signed and issued in the usual way, by direction or permission of the mother Bank, and in strict conformity to the charter and laws governing the institution, so far as our Branch was concerned. I can speak for no other.” (Pages 146 and 147 of printed record.)

In answer to question No. 5, he says: "Said notes were issued to enable the Bank to keep up its line of discounts, to facilitate its increasing business, and to supply the place of its mutilated issues, which had been returned and charged off, and deposited in its vaults or burned. Such notes were paid out in the usual course of business of the Bank, such as discounting notes and bills, buying exchange, paying deposits, current expenses, etc." (See page 147 of printed record.)

He adds on the same page, and in answer to the next succeeding question, as follows: "The Branch Bank of Tennessee at Columbia, as an institution, made no issue in aid of the so-called rebellion."

Mr. Rye (the Cashier of the Branch Bank at Columbia) repeats, in substance, the evidence of Mr. Dunnington. He also informs us that a part of the "new issue" was signed by the officers of the Branch, *under instructions from the mother Bank at Nashville, and the remainder were signed by the officers of the mother Bank, and sent to the Branch at Columbia.* (Page 549 of printed record.)

I have, as I believe, now quoted the pith or essence of the evidence in favor of the "new issue." If I had quoted the whole of each deposition, in so doing I would have added nothing in strength to that side. And having so done, allow me to make a few observations upon the testimony of Messrs. Dunnington and Rye.

Although it be true, that the officers of the Branches of the Bank of Tennessee could sign the circulating notes to be issued and used by that Branch, yet this could be done only *by permission of the mother Bank.* In other words, the Bank at Nashville usually sent circulating notes to its Branches to be used by the latter, which notes were signed and complete in every respect. But it could send to its Branches notes which were incomplete and could authorize the officers of its Branches to sign and put the same in circulation. But, I take it, that the Branches had no discretion as to the necessity, or the amount, of the new circulation, except under the permission and authority of the mother Bank at Nashville. (See Nicholson's Supplement, page 34, sec. 7, of Act of 1838.)

Under these circumstances it might be true, that the Branch Bank of Tennessee, at Columbia, needed, in the year 1861, an additional amount of circulating notes, with which to carry on its ordinary business, and yet that deficiency may have been caused, *and doubtless was caused, by the very agreement into which the Bank of Tennessee at Nashville had entered, or expected to enter, with the State, to accept and pay the checks of the Military Board, drawn upon it by that Board in furtherance of the war.* If it be true, as is admitted in the agreement between the counsel in this cause, and which I have already quoted, that the circulation of the Bank at Nashville was insufficient to carry on its ordinary business, and also pay the checks of the Military Board, how could it furnish its Branches with enough of its old issue to do their ordinary business? It would be necessarily forced either to make a new issue or authorize its Branches so to do. And so Messrs. Dunnington and Rye might well say, in one sense, that the Branch Bank at Columbia, as an institution, issued these new bills to "keep up its line of discounts, to facilitate its increasing business, and to supply the place of its mutilated issues," and yet at the same time it would be true, that the increase of the circulation was made to further and aid the rebellion — *that would be its real and controlling cause.*

However, I have said enough on this point. If the testimony of Watson, Dunnington and Rye tended to prove, and was strong evidence, too, that the "new issue" was legitimate because made for legal purposes, what would it amount to in this case? We would have had the right to combat that evidence, and to overthrow it by other and stronger evidence if we could. But we were prevented from exercising this right, and making this proof, by the agreement already quoted, in which

it was admitted that the Bank was compelled to make this "new issue," in order to enable it to accept and pay the checks of the Military Board, and at the same time carry on its ordinary business. Of course this admission will control, and no outside evidence will be allowed to contradict it.

So then I take the facts to be clear. No one can misunderstand or doubt as to what they are, unless he wilfully closes his mind. The President and Directors of the Bank of Tennessee at Nashville, certainly did know that the Military Board asked for money to be used in arming and equipping the troops of the State. The President and Directors of the Bank of Tennessee, at Nashville, certainly did make this "new issue," because the old issue of the Bank and its Branches were insufficient to enable the Bank to advance to the Military Board the money it asked for, and also to carry on its ordinary business. These two facts are admitted in the agreement of counsel, and, therefore, are so clearly established as to admit of no controversy. I think it is also sufficiently clear to the mind of any one, who acts upon probabilities, that the President and Directors of the Bank made this "new issue"—I mean were *moved or induced to do so*, not to enable the Bank to make a speculation or profitable investment of its funds, but to enable it to give aid and comfort to the enemy of the United States.

Having thus stated the facts, let us now apply to them the principles of law, which may be applicable.

1. If all the facts be as I have stated them to be, I insist that the "new issue," as it is generally called, is void. If the Bank of Tennessee increased its circulation for the purpose of enabling it to give aid and comfort to the State in the late war, it would be an act, on the part of the Bank, expressly forbidden to be done by the Constitution of the United States. It would not, therefore, be within the scope, or legally in the power, of the Bank to do such an act. I understand the law to be, that an act, done by a corporation, is said to be *ultra vires*, not only when no power is given in the charter to do such act, or when the act so done is inconsistent with the nature and object of the charter, but also when the act is done for an unlawful purpose, although if done for a lawful purpose it would be fully within the scope of the general powers of the corporation. "No law is better settled," says Judge Green, in the case of *Hale v. Henderson*, "than that no action will lie to enforce a contract made in violation of a statute or of the Common Law, or which is immoral in its character and against public policy:" 4 Hump., 200. Of course, the principle is applicable alike to corporations and to individuals, and for a higher and stronger reason no act would be lawful which was done, not only to violate but actually to overthrow and destroy the Constitution and Government of the United States. We all know that an act, even of the Legislature of a State, which is violative of the Constitution of the United States, is utterly null and void. We all know, too, that a bond of a State, made to enable it to raise money with which to arm and equip its troops to fight against the Government of the United States, is an utter nullity. Not voidable, not void *sub modo*, but void *in toto*. If this be so, how can we say that a Legislature may empower a corporation to do that which it can not do itself. The creature is not, and can not be, greater than the creator. Therefore, although it was fully within the scope of the general powers of the Bank of Tennessee, for lawful purposes, to make its notes for circulation as money, yet if these notes were made to enable the State to arm and equip its troops to fight against the troops of the United States, they are utterly null and void. It is certain, that the note of an individual, made under such circumstances, would be void, and the note of a corporation would, for a stronger reason, be void also.

In the case of *Thomas v. Taylor*, decided by the Supreme Court of the State of

Mississippi, this principle is clearly and distinctly announced. "Hence," say the Court, "it will be seen that these notes were intended to supply an important part of the revenue by which the State Government was to be sustained, and enabled more effectually to aid the Confederate Government in the prosecution of a sanguinary war, waged expressly for the purpose of subverting the Government of the United States. These Treasury notes, being thus issued against the public policy, and in violation of the Constitution of the United States, are therefore illegal and void:" See 2 American Rep., 640. In the case of *Weith & Arents v. The City of Wilmington*, decided by the Supreme Court of the State of North Carolina, the same principle is carried even to the verge of error. In that case the facts are as follows: The City of Wilmington borrowed of John Dawson \$10,000, and gave to him its bond therefor. This money was so borrowed to enable it to obstruct the navigation of the river in aid of the rebellion. Afterwards, and before the bond became due, John Dawson sold and assigned it to James Dawson, who took it without notice of the illegal purpose for which it was made. The City of Wilmington took up and paid its bond for \$10,000, by substituting its ten bonds in lieu, each for \$1,000. Now, these ten bonds were bought by plaintiffs in open market, and without notice of any illegality, and upon the City of Wilmington's refusal to pay them, suit was instituted to recover the money. The Circuit Judge held the bonds to be illegal, and, upon an appeal, the Supreme Court affirmed the judgment of the Court below. The Supreme Court, in its opinion, say: "Suppose that there was no such ordinance and no such provision in the Constitution as quoted above; and suppose the City of Wilmington had issued its bonds or levied a tax to pay the original claim of John Dawson; and suppose the question had come before the Court, either by the city's refusing to pay the bonds, or by the tax-payers resisting the tax, would this Court, sitting to maintain and administer the laws of the rightful Government, enforce the payment of the debt? Clearly not. And why not? Because it would be against public policy. And the Court would hold that the city authorities had no power to issue the bonds, and no power to tax the citizens to pay them."

I have already said that an act done by a corporation may be *ultra vires* when the power to do such act is not given in the charter for any purpose, and not only so, but also when the power is given for some purpose, but the act is done for an illegal purpose. I believe the authorities so hold. But they differ in stating the consequences which result from the act in the second class. It is generally held that the act is void, if the charter does not confer upon the corporation the power for any purpose. But if the power is given to do the act for some purpose, and it is done for a different purpose, authorities may be found which hold that the act is not void in all cases. A railroad company has the power to buy iron with which to build its road, but not to speculate in iron. A bank has power to buy real estate upon which to erect its banking house, but not to deal in real estate generally. Now, if a railroad company gives its note for iron bought on speculation, you may find authorities which hold that its note is not void in the hands of an innocent holder for value. This may be the correct ruling. But, I suppose, you will hardly find a case in which it was held that the note of a bank was not void, which had been given to aid in pulling down and destroying the Constitution and Government of a country in which it was located, and to which it owed its allegiance. A note given under such circumstances would be not voidable, not void to some extent, but absolutely void, and for all purposes. Public policy, if not the very existence of good government, would demand such a ruling. And we know that if once void it would continue to be void, in the hands of every one. Mr. Parsons, in his work on Promissory Notes, says: "And if the paper be illegal on any ground, which makes it null and void as between

the original parties, it is equally void in the hands of subsequent parties." (See I. vol., 276.) I have said so much, upon the supposition that the Constitution of the United States only forbade us to give aid and comfort to the enemies of the United States. But the 14th amendment to said Constitution also declares that debts, obligations or claims "incurred in aid of insurrection or rebellion against the United States," "shall be held to be illegal and void." The Constitution of the United States not only forbids such acts to be done, but declares all debts, obligations or claims therefor if done, illegal and void, and that they shall be so held and treated by the courts. It is clear the Constitution of the United States could rightfully prohibit even the chartering of banks, and if chartered, could rightfully prohibit the making of circulating notes for any purpose whatever; and if so, it could, of course, rightfully declare that such circulating notes, if made in aid of an insurrection or rebellion against the United States, should be null and void. No Court could rule otherwise in the teeth of this provision of the Constitution; otherwise the Constitution would not be the supreme law. A note declared void, even by statute, is void in the hands of whomsoever it comes. Of course, then, if the facts be as I understand them, this "new issue" is utterly null and void. No escape, as I conceive, can be made from this conclusion.

And I am told, in reply to this position, that no one now before the Court is seeking to enforce the contract of the State made, through its Military Board, with the Bank of Tennessee; that, although the contract between the State, through its Military Board, and the Bank of Tennessee, may have been void, because violative of the Constitution of the United States, yet the said Bank transferred these Torbett notes, known as the "new issue," to third persons for a legal consideration, and, therefore, that the contract between these third persons and the said Bank is legal and binding. To this I rejoin, that the position, in one sense, is a sound one. If the Bank delivered this "new issue" to innocent third persons for value, the Bank would be liable to such third persons for the value it so received. To that extent the contract would be legal and binding. But if it be meant that the notes themselves, although void in their inception, were, by the subsequent transfer or delivery, rendered valid, then I deny the position, and insist that it is utterly indefensible, if not absurd. If in this way the devil could be whipped around the stump, then the prohibition in the Constitution of the United States would be rendered thereby wholly nugatory.

Unquestionably these Torbett notes, known as the "new issue," were void in their inception, because made for the illegal purpose of giving aid and comfort to the enemy of the United States. And to understand this point more fully and clearly, allow me, in addition to the evidence already referred to and cited, to make one extract from the deposition of Colonel Torbett, the then President of the Bank. On page 142 of the printed record he says as follows: "The bills were issued in the usual way, by receiving the signatures of the President and Cashier, then passed into the Teller's cash, and were paid out promiscuously with all other bankable funds as money, to all who had the right to check on the Bank for money. The signing and issuing was done in strict conformity with the charter and laws, as the Board understood them."

Yes, these Torbett notes, known as the "new issue," were passed into the Teller's cash as money. Their formal execution was perfect and complete. The President and Directors of the Bank did not contemplate, in making these Torbett notes, to pay them out exclusively or solely to the Military Board. On the contrary, they intended to create these Torbett notes, or to make them a part of the funds of the Bank, and to pay them out indiscriminately, with all other kinds of money, to any one "who had the right to check on the Bank for money." The act of the President and Directors

of the Bank was therefore consummated when the Torbett notes were passed into the Teller's cash as money. I suppose all this is clear, and will meet with the assent of all parties. If so, I insist that they (if they had been legally made) would be property, and could be stolen. They would stand precisely as any of the notes of the same Bank which had been put into circulation, but which had been returned into the Bank again. My mind can see no legal distinction between the two. And when these Torbett notes were put into the Teller's cash, the Teller and his security from that time became responsible for their safety and for their misapplication. If that be so, then I take it to be clearly the law that when these Torbett notes were put into the Teller's cash it amounted, constructively, and in law, to an issuance of them. That seems to have been the opinion of Colonel Torbett, if we can infer his opinion from the language he uses in the extract just given, and I think, also, that such is the deduction which the law would clearly draw from the facts stated in said extract.

Now, we say, that these Torbett notes were unquestionably void down to the time they were put into and made a part of the Teller's cash, and during all the time they remained in the cash-box, or were in his possession. That is a position which I do not think can be successfully disputed. And if I be correct in my judgment, how could they be made valid by the act of the Teller in paying them out to the people? If the Teller had such power, its exercise would be the imitation of a miracle; it would be like calling Lazarus from the tomb to life. But we deny the power to the Teller, and say that no such mimic omnipotence is attached to his office. If these Torbett notes had been legally made, then their delivery by the Teller would be binding upon the Bank, because he was the agent of the Bank for that purpose. But if void, because the Bank could not legally make them for such a purpose, how could the Teller breathe into them the breath of life? It is utterly absurd to take such a position as that. And yet it was made to play a very important part in the decision of this case in the Court below.

Let me be understood. I have already admitted that, although these Torbett notes may have been void in their inception, yet if they were subsequently delivered to an innocent holder for value, such holder would not be remediless. This would be held upon the ground that the Bank should not be permitted to take advantage of its own wrong, and thus defraud an innocent person. But how could he recover? Could he sue and recover upon the notes? Unquestionably not. How could he sue upon a nullity—upon that which was not? He could only sue for and recover back that which he had paid to the Bank. The law, being just, would restore back to him his own, or, if that could not be done, it would give to him the value of the benefit he had conferred upon the Bank. In the case of *Leavitt v. Palmer*, reported in 3 Comstock's Reports, Judge Bronson has expressed with clearness the principle. On page 43 he says, as follows: "As the issuing of the notes were expressly prohibited by law, it is impossible to maintain that they were valid securities. To hold that they can be enforced against the Bank would be going very far toward defeating the end which the Legislature had in view. That they were void has been adjudged in several of the cases already cited; and I am not aware of any authority to the contrary. The legal liability on account of which the notes were issued still remains, but the notes themselves are void." Yes, and to hold that suit could be brought upon this "new issue," "would be going very far toward defeating the end" which the framers of the Constitution of the United States had in view when they forbade any citizen to give aid and comfort to the public enemy, and would tend to render that provision wholly nugatory.

Am I told that the State and Bank of Tennessee are estopped from averring and proving that these Torbett notes are void, because made in violation of the Con-

stitution of the United States, that the State and the said Bank are *particeps* of the guilt, received the benefits therefrom, and ought not now be allowed to make this defense? In reply to this, I say that if I understand the doctrine of estoppel, it does not, in any case, prevent a corporation *from denying that it could legally do the act*. The law was so held in the case of *Hood v. The New York and New Haven Railroad Company*, reported in 22 Connecticut Reports, 508-9. That case was twice argued, and was decided after the most mature deliberation, and was, therefore, given under such circumstances as entitles it to the highest respect. Judge Ellsworth delivered the opinion of the Court, and, near the conclusion of the opinion, says as follows: "We place our judgment upon a plain principle of equity and law, viz: that these defendants are not bound by a contract *they had no power to make*, and are not estopped from setting up this matter in defense." How could it be ruled otherwise? The estoppel which could be pleaded would be one *in pais*, and would be based upon the acquiescence or consent of the Bank. Of course, if the Bank *could not legally make the contract*, the contract could not possibly be inferred from its acquiescence or consent. Judge Ellsworth well says, "however *individuals* may be liable and estopped, who untruly hold themselves out as clothed with power, the defendants can not be estopped on any such principle of law known to this Court." A corporation has the power to do just what it is expressly authorized to do in the charter, and no more, and in these days, when the tendency is to absorb everything into corporations, and when we see how grasping and conscienceless are corporations in all their acts, it behooves well the courts to make this rule inexorable.

The same doctrine is laid down, as I understand, in the case of the *Pennsylvania, Delaware and Maryland Steam Navigation Company v. Dandridge*, reported in 8 Gill and Johnson's Reports, 248. That case I have not been able to examine for myself, but have no doubt that it fully coincides with the case already cited from Connecticut. In the Pittsburg Legal Journal of December, 1873, a reference is made to the case of *Ryan v. Lynch et al.*, recently decided by the Supreme Court of Illinois, in which the editor thus states the principle decided: "That the bonds in question were issued under the above act, and it appearing that it was not read on three different days, nor was it passed by a vote by the ayes and nays in the Senate; that such a bill never became a law and the bonds were not merely voidable, but that they were absolutely void for the want of power or authority to issue them; and in consequence, no subsequent act or recognition of their validity could so far give vitality to them as to estop the tax-payers from denying their legality, and being void, such bonds can not be collected in the hands of an innocent holder."

In the case of the *City Council of Montgomery v. the Montgomery and Wetumpka Plankroad Company*, reported in 31 Ala. Rep., (new series) page 88, the Court not only clearly expresses the law, but gives the reason, or one of the reasons, upon which it is based. It says: "It is further urged in maintainance of this action, that inasmuch as the Plankroad Company *has had the benefit of the city bonds, and obtained them on the faith of the contract, which is the subject of this suit*, the obligors on this bond should be held estopped from disputing the authority of the city to make the contract. If this doctrine be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and *their very usurpations have the effect of conferring powers on them which the Legislature has withheld*. A proposition so erroneous can scarcely need argument to overturn it."

But if we had no decisions upon the point to guide us, the principle is too plain to be misunderstood. And by way of giving strength to the view I have taken, allow me now to say, that the State and Bank of Tennessee are not the only parties

interested in this question. If they were, public policy alone would forbid that that they should be estopped from averring and proving that the contract sued upon had been made in violation of the Constitution of the United States. But the depositors now step forward and claim that their interests and their rights are involved. The decision of the point will either establish or overthrow their claim, accordingly as it is made. If the Bank be estopped from averring and proving the truth, then overboard goes their money. The Bank of Tennessee is insolvent, and is admitted to be so in the original bill. The assets of the Bank will not be sufficient to pay even the "new issue," by perhaps a million or more of dollars. Of course, then, if the State and Bank are estopped from proving that the "new issue" is void, because it (the Bank) had not the power to make it for the purpose it was made, then the assets will be consumed in the payment of these notes. Now, if these notes were illegally made, it was a great and grievous wrong to the depositors on the part of the Bank to make them. They did not ask the Bank to make them, nor did they, in any way, contribute or aid in the illegality. They are altogether free from the sin, if such it was. Are they, too, estopped? Could the President and Directors of the Bank of Tennessee, without the consent of the depositors, and in violation of the law, thus deprive them wrongfully of their money, and the courts deprive them, without sin or fault on their part, of the right to prove the truth? Such a ruling would be execrable.

In passing from this, the first point in my argument, allow me once more to call the attention of the Court to the agreement of the counsel, already quoted. It will be observed, that it is said therein, that the *new issue* of the Bank was insufficient "to meet the usual banking business of the Bank in 1861, and drafts and checks drawn upon the Bank by the Military Board, and that the Bank was compelled, in order to meet its regular business, *and the demands of the said Board*, to resort to the issuance of the bank notes now in controversy, known as the new issue." In other words, the agreement does not say that the Bank made the "new issue" *solely* to meet the checks of the Military Board, but it does say, that it was so made to enable it to carry on its ordinary business, and to meet the checks of said Board. And I now aver, that the transaction was, thereby, rendered as vicious as if the *sole* and *only* motive of the Bank had been to pay the checks or drafts of the Military Board. "A little leaven leaveneth the whole lump," and so does an illegality as to part taint or diffuse its poison through the whole of the transaction. This is a principle of law well established, and is well-known to the profession, and, therefore, needs the citation of no authorities in its support.

If the facts are conceded to be as I have stated them, these Torbett notes, known as the "new issue," are void, because made for an unlawful purpose. The State owned the stock of the Bank. The State appointed the Directors of the Bank. The State rebelled, and asked for money to arm and equip its troops. The Bank knew for what purpose the money was asked and to what purpose it would be applied. And yet the Bank, knowing these facts, advanced the money. When it was known that the city of Nashville would fall into the possession of the Federal army, these same officers precipitately fled, with the assets of the Bank, into the heart of the Confederacy, and remained there during the war. If these facts do not show that these Torbett notes were made in aid of the Confederacy, then if one arose from the dead and proclaimed it, we would not believe him.

2. I now take a position which may be regarded by some as more doubtful, and, for that reason, will look at it more closely, and will treat it at greater length than the first head of my argument. I now argue that the law, in cases of this character, will conclusively presume that the officers of the Bank intended to give aid and comfort

to the State, from the bare knowledge—which it is conceded they had—of the purposes to which the money would be applied. And, inasmuch, as this Court has made several decisions which bear upon this point, it will be proper, in the first place, to examine these decisions, and understand the extent to which they go.

The case of *Naff v. Crawford*, reported in 1 Heiskell's Reports, is the leading case. In that case, on page 116, Judge Freeman is made to say as follows:

"We lay down the rule, as deduced from these illustrations, to be, that the agreement must be to do or further some illegal or immoral purpose, or some purpose in violation of public policy."

I observe, in the first place, that the facts developed in the case of *Naff v. Crawford* are totally different from the facts developed in this case. I yield my assent to the correctness of the principle, which I have just quoted, when applied to the facts of that case, and, I believe, that decision has been sustained by the Supreme Court of the United States. In that case, the illegality had been committed; the Confederate notes borrowed by Naff from Crawford, and in consideration for which he had executed his own promissory note, had been issued, and at the time were in circulation. These Confederate notes, so borrowed by Naff, were, at the time, of value in the community, and were, of course, sufficient to support his promise. Neither Naff nor Crawford had anything to do with the illegality in issuing these Confederate notes. And the same might be said of the case of *Random v. Toby*, reported in 11 Howard's Reports, to which Judge Freeman refers, and which is the most striking case to which he does refer. The negroes, for which the notes of Random had been given, had been previously brought into the State of Texas. The parties had no connection with the illegal transaction, and Judge Freeman clearly saw and made the distinction. In the paragraph next to the one I have quoted (page 116), he says as follows:

"The element that destroys the validity of the agreement is the purpose, by the agreement, to effect or aid the forbidden end, or else the consideration for the promise must have been to do or perform an illegal or immoral act. If this were not the rule, then a contract might be declared void, as against public policy or public law, that did not stipulate for any violation of the one or the other."

If I correctly understand the principle upon which the case of *Naff v. Crawford* was decided, so far from its being contradictory to, it is confirmatory of, the position I have taken and am now endeavoring to maintain. I say the purpose on the part of the Bank was to effect or aid a forbidden end, and was to do an illegal act. In Parsons on Promissory Notes and Bills of Exchange, the law is laid down to this effect:

"Thus, if money be loaned to a man expressly to game with, and the borrower gives his note for it, the note can not be enforced." So it is laid down in Story on Contracts, as follows: "So, also, a lease of lodgings for the purpose of prostitution is void:" Section 542. If a man proposes to borrow of me money, and, at the time, states that he wishes to get the money to gamble with, or if he proposes to rent of me my house, and at the time, states to me that he wishes to use it for a brothel, in either case it would be an assent on my part to the purpose if I yielded. In other words, it would be an agreement that the money borrowed should be used in gambling, and that the house rented should be used for the purposes of prostitution. But if after the transaction, I sell the note of the borrower of my money, or of the renter of my property to another (given under the circumstances supposed), in that case the transferee, with or without notice of the illegality of the original transaction, could hold me liable as indorser. He could not hold the borrower of my money, or the renter of my property—in other words, he could not hold the maker of the note—liable, as I will attempt hereafter to show, but he could hold me bound upon the subsequent

indorsement, even though he knew that the consideration for which the note had been given was illegal. That is the precise point decided in the case of *Naff v. Crawford*. If I have correctly apprehended the principle laid down in the case of *Naff v. Crawford*, and if also it be the law, that it would be unlawful, and the contract void, to loan money to gamble with, or to rent a house for the purposes of prostitution, how can it be made to appear that the new issue of the Bank of Tennessee is valid? It is admitted in the agreement of counsel, a part of which has already been quoted, and to which I have so often referred, that the officers of the Bank, at the time, knew that the money asked for by the Military Board was to be used in arming and equipping the troops of the State, and knowing that fact, the notes of the Bank known as the "new issue," were put into circulation after the 6th day of May, 1861, "and for the purposes aforesaid"—that is to say, to enable the Bank to meet its regular business *and the checks of the Military Board*. If the Bank did not assent that the money to be advanced by it should be so applied, then it is difficult to understand what would constitute assent. It knew, before it advanced the money, for what purposes it was asked, and to what uses it would be applied, and knowing these facts, it agreed to advance, and did advance the money.

Let me now call the attention of this Court to the case of *Tedder v. Odom et al*, reported in 2 Heiskell's Reports, page 68. In that case the parties *were private individuals, and neither of them an enemy of the United States, in the legal sense of the word*. The buyer had not entered into the service of the Confederacy *up to that time*. In the language of Judge Nicholson, the buyer (Tedder) "being about to enter the cavalry service of the Confederate States, purchased of one of the defendants a horse to be used in that service." Of course, there remained to him the *locus penitentiae* until he did so enter into that service, and, up to the time that he did so enter it, it was perfectly lawful to sell to him. He might change his mind and never enter it. That was one step. But if he did enter it, he might not choose, or the Government into the service of which he did so enter, might not allow him, to use the horse he bought. That was another step. At all events, it was perfectly lawful to sell to him whilst he remained a citizen of the United States and until after he had thrown off his allegiance, and had placed himself in antagonism to, the Government of the United States. Suppose he had been indicted for treason—I mean, suppose the seller in that case had been indicted for treason—upon what principle of law could he have been convicted? How could it be said that in law he adhered to the public enemy, giving him aid and comfort? Or, how could it be said that in law he had done that which was unlawful? In that case, Judge Nicholson might well say, as he does say, that the owner did not agree "to sell the horse in consideration that complainant would use him in the Confederate service, but in consideration that complainant would give him his note for \$150 with two securities." But on the other hand, suppose that the owner had sold the horse to an officer of the Confederacy, to one whose duty it was to purchase horses for the Confederacy—and it was known to the seller that he was purchasing the horse in that capacity, how would the case stand then? If I put into the hand of one of two combatants a club, knowing at the time he intends to use it upon his adversary, am I not guilty of an assault and battery? Yes, guilty as a principal. Is not the inference irresistible and conclusive that I *intended* the injury to be inflicted, and to aid my friend? Could any words that I might use make this point clearer? In the case now before the Court the sovereign State of Tennessee was one of the combatants. She had thrown off her allegiance, and had swung her fist in the face of the United States; she had entered into a league, offensive and defensive, with the Confederate

States, and at the time was in the act of girding her loins for the mighty struggle. At this time the Bank increased its circulation in order to enable it to furnish to the State the means to arm itself. Can anybody be found who would say that such an action was lawful?

The two cases which I have referred to, show the extent to which this Court has gone upon the point now under consideration. I believe all the cases decided by this Court, which have been published, may be placed under either the one or the other of the two cases to which I have called its attention. It is certain that this Court, in two cases (*Story v. Dobson et al.*, 2 Heiskell Rep., 29; *Rogers v. Leftwich*, *Ib.*, 489), decided at the same term as that of *Tedder v. Odom et al.*, refused to pass judgment upon the legality or illegality of the new issue of the Bank, and if it has since done so I am not aware of the fact. If this be so, then the road is clear and free from all obstructions, and I think it can be shown beyond peradventure, that in cases of the character of the case now before this Court, *the law will conclusively presume from the bare knowledge of the uses to which the money would be applied*, that the officers of the Bank, in making the advancement, intended thereby to give aid and comfort to the Confederacy in its struggle against the United States.

I am aware that cases may be found in which it was held that a knowledge of the illegality does not render the transaction void as to him who did not otherwise participate. And I think that some of these cases may be successfully defended even upon the ground of sound morals. Take the case of *Naff v. Crawford* as an example. There the illegality had been committed. The Confederate notes had already been issued and were of value, and had been passed in the community as money. It was not, therefore, either illegal or immoral for one to buy or borrow such and to execute one's own notes therefor. He could use these Confederate notes as money, and with them buy property. Should he be permitted to hold this property, or enjoy the use of the Confederate money whilst it was of value, without making compensation therefor to the former holder? And don't let us be misled by the specious idea that, by taking these Confederate notes, the citizen thereby approved and encouraged their issuance. I meet the objection fully and squarely in the face, and deny the proposition. The citizen, as such, had nothing to do with furnishing to the country a circulating medium. That was no business of his. That was an affair solely of the Government under which he lived, and he was bound, under the circumstances in which he was placed, to use such currency as was furnished him, whether it consisted of shells, or pewter, or brass, or paper, or gold and silver. In no sense, either legally or morally, could it be said that the citizen approved the act of the Government, nor could he control its action. Other cases, perhaps, could be cited to show that a bare knowledge of the illegality would not invalidate and annul the transaction, and would be cited by me, and the principle explained, had I the time to do so. But, it is equally clear that there are other cases in which a bare knowledge of the illegality does taint the whole transaction, and render it null and void. Take the case put by Lord Chief-Justice Eyre, in the case of *Lightfoot v. Tenent*, reported in Bos. & Bull., 351, 156. I use the language of his Lordship:

"But the man who sold arsenic to one he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract, in itself good, is there tainted with turpitude, which destroys the whole merit of it. I put this strong case," says he, "because the principle of it will be felt and acknowledged without further discussion. Other cases," he continues, "where the means of transgressing a law are furnished, with a knowledge that

they are intended to be used for that purpose, will differ in shade more or less from this strong case; but the body of the color is the same in all. *No man ought to furnish another the means of transgressing the law, knowing that he intended to make that use of them.*"

Judge Story, in his work on the Conflict of Laws, in referring to this case, uses this strong language, in commendation of the position:

"The wholesome morality and enlarged policy of this passage makes it almost irresistible to the judgment; and indeed the reasoning seems positively unanswerable:" Sec. 253.

The doctrine of Lord Eyre has been expressly adopted in other cases. Thus, in the case of *Langton v. Hughes*, reported in 1 Maule & Selw., 593, a person was not allowed to recover upon a contract for drugs to a brewer, and which he knew the brewer intended to use in the poisoning of his beer. A stronger case could not, perhaps, be put to illustrate and enforce my position. Just think of it for a moment. A brewer of lager beer buys poison to put into his beer to make it more palatable, but which he knows will soon kill those who use it. He buys the poison of a druggist, to whom all the facts are made known. And yet, being overcome by his infernal thirst for money, and being callous to the suffering of his fellow-creatures, the druggist sells to the brewer upon a credit. Do you say in such a case that suit could be maintained by the druggist against the brewer? Do you hold that the druggist would be allowed to say in his defense that he sold the poison for its value, and in the line of his business, and not to aid the brewer in killing his customers? God protect us from such ruling. Lord Ellenborough, in the said case of *Langton v. Hughes*, held to a different doctrine. He said in that case, as follows:

"A person who sells drugs with a knowledge that they are meant to be so mixed, may be said to cause or procure, *quantum in illo*, the drugs to be mixed."

Many cases may be supposed in which the moral sense would be shocked if it were not so held, and that knowledge, necessarily, implied a participation in the illegality. Suppose that a traveler were to stop at an inn, and the innkeeper resolved to take his life for his money; suppose, further, that the innkeeper applied to a merchant to buy a pistol with which to take the life of his guest, and before he made the purchase, stated to the merchant the purpose for which he was going to buy the pistol, and the merchant knowing the facts, and believing that such was the intent, were nevertheless to sell the innkeeper the pistol, could the merchant in the case supposed exonerate himself from guilt by averring that he did not coo-league with the innkeeper to take the life of the traveler, but simply sold his pistol for its value in money? I think that he would be as guilty in morals and in law as the innkeeper. If that be so, how could the merchant recover in a court of either law or equity the price of the pistol? If I apprehend and correctly state the law upon this point, then, for a stronger and higher necessity, the same principles would apply in a case where a citizen advanced his money or did an act, knowing, at the same time, that the money so advanced, or the act so performed, would be used in taking the life of the government then over him. No government worthy of the name could tolerate any other principle. If there had been a combination of men banded together to overthrow the Government of the State of Tennessee, and the Bank of Tennessee had created this new issue to enable it to advance to this combination of men money with which to arm and equip themselves against the State, who could stand long enough to listen to the defense that is now made?

I well know that, almost from the formation of the Federal Government down

the commencement of the late war, two doctrines, diametrically opposite each other, were held as to the nature of the allegiance which the citizen owed to the Government of the United States. One held that the allegiance which a citizen owed to the Government of the United States was paramount; the other, that it was subordinate to the State of which he was a citizen. The latter, as a consequence, also held that a State could lawfully secede from the United States, and if it did secede, its citizens were bound to yield to it their allegiance; the other party held that a State could not lawfully secede, and if its citizens attempted to do so they would be guilty of rebellion, and would be liable to penalties for a crime of the highest grade. We all knew these two theories, and in taking sides we made up our minds to take the chances. Now, the war decided this point, and decided that our resistance was rebellion. And the South, in laying down its arms, accepted the doctrine that it was unlawful to resist the United States, and that our allegiance to the United States was paramount to that of the State in which we live.

But, without reasoning further upon general principles to establish this position, allow me now to say that the Supreme Court of the United States has decided the point, and has placed the principle beyond further disturbance, in cases of this character. When I say, has decided the point, I mean to say it has decided that *the bare knowledge* that the money was to be used in aid of the rebellion, made the transaction void *in toto*. And when I say, has placed the principle beyond further disturbance, I mean to say, simply, that the Supreme Court of the United States was created to interpret the true and final meaning of the Constitution, and I suppose its decision would be yielded to by all other Courts.

In the case of *Hanauer v. Doane*, reported in 12 Wallace's Reports, Judge Bradley delivered the opinion, and on page 347, is made to say as follows:

"No crime is greater than treason. He who, being bound by his allegiance to his government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or of a misprision thereof. He voluntarily aids the treason. He can not be permitted to stand on the nice metaphysical distinction that, although he knows the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act."

Nothing which I could further say on this point would add either clearness or strength to what I have already said. I shall therefore pass on.

3. But it is said that this new issue of the Bank was put into circulation in the usual way. Col. Torbett, as I have before stated, tells us (page 142) that these circulating notes were "passed into the Teller's cash, and were paid out promiscuously with all other bankable funds as money to all who had the right to check on the Bank for money." This is THE FACT upon which this defense is mainly, if not solely, based. But in reply I say, that I go behind the issuance or paying out of these circulating notes, and aver that they were void in their inception, because made for an unlawful purpose. That they were made for an unlawful purpose, and therefore void, I have already discussed. And now, taking that for granted—that is to say, taking it for granted that these circulating notes were made for an unlawful purpose, and were consequently void—does the fact that they were passed into the Teller's cash, and promiscuously, with the old issue, paid out as money, breathe into them the breath of life? If the subsequent issuance or paying out of this "new issue" would have such an effect, I confess I do not see upon what princi-

ple. I have already admitted, and now again admit, that, if an innocent person took these notes from the bank for value, such person would have a claim against the bank, which would be legal, and which could be enforced in the courts. But he certainly could not sue *upon the notes themselves*, because they would be null and void. He could only sue for the value of the consideration he had paid for them. And this court will at once see the material distinction between suing upon the note itself and for the consideration which had been paid. As note holder, he would be entitled to priority of payment out of the assets of the bank, and to the exclusion of all other creditors of the bank; as owner of a claim or debt against the bank, he would stand upon the same platform as other creditors, and share equally with them.

And now allow me to ask, upon what evidence in the record do we infer that this new issue passed into the hands of innocent holders for value? *The present holders certainly took this new issue with full knowledge of all the facts, and well knew that it had been made in aid of the rebellion.* That fact is distinctly admitted in the agreement of counsel, to which I have so often referred. The last sentence of that agreement, but one, is in the following words:

"The defendants, holders of such new issue, as aforesaid, *knew at the time they bought the same* that they had been declared void by the 6th section of the schedule to the Constitutional Amendments, as aforesaid, and because they were supposed to have been issued for the purpose of aiding the late rebellion." See pages 188 and 189 of Record.

But, it may be said, that although the present holders may have had notice of the illegality, yet if there were between them and the first takers such innocent holders for value, they would be substituted to their rights. I admit the law to be so; but insist, and will attempt to enforce the position presently, that *neither the first takers, and no subsequent holders, can acquire any rights to a note void in its inception.*

However, admitting for the present that the principle stated is applicable to the present case, I again ask upon what evidence in this record do we infer that this new issue passed into the hands of innocent holders for value? Certainly the law casts upon the holders of this new issue the burden of making such proof. In the case of *Paton v. Coit et al.*, reported in 5th Michigan Reports, page 505, Judge Christiancy, in delivering the opinion of the Court, holds the following language:

"The rule as to the burden of proof is the same upon principle and authority at common law. Whenever the consideration of the paper between the original parties has been illegal, especially if in violation of a positive prohibition of statute, proof of such illegality throws upon the holder the burden of proving that he got it *bona fide* and gave value for it."

The same doctrine is laid down in the April No., 1872, of the "Southern Law Review," page 229, in an article written by Mr. Daniel, entitled "Negotiable Instruments, Rights of Purchasers, etc." Taking the law to be such, I again ask that the proof be pointed out. Who were these prior innocent holders for value? Not one name is given to us, and no proof is made upon which this Court could act. I admit it is said that the new issue passed like the old issue at first—that the community made no distinction between them. But so did Confederate notes. And yet who did not know that these latter notes were illegal? Who would say that the holders of such were innocent holders in the sense of the law? The truth is, and known to all, that if every man and woman in the State had known, when the war commenced, all the facts—that this new issue was made to aid and advance the cause of the Southern States—they would have taken it nevertheless as readily as gold.

I wish, however, to be understood. I do not say that there were no such innocent holders for value. I only say that if there were such holders, it was a fact to be

proved; that the law cast the burden of proving this fact upon the present holders of this new issue, and that they have utterly failed to make this proof.

But I come now to say that the doctrine of substitution is not applicable to the present case. I aver it to be the law, that a note void in its inception can not be so transferred as to convey to the subsequent taker any rights against the maker. Between all parties subsequent to the maker the transfer would be treated as a new contract, and would be valid if otherwise unobjectionable. That principle was so decided, as before stated, in the case of *Naff v. Crawford*. But certainly the maker of the note as such could not be made liable *by the subsequent act of other parties*. That proposition seems to me to be self-evident. Do not let us misunderstand the law upon this point, and confuse ourselves about a principle of law so plain.

If a note be complete and valid in its inception, and afterwards comes into the hands of an innocent holder for value, in such case no intervening illegality—such as theft or other cause—would destroy the rights of the innocent holder. But where the note is void in its inception, for any cause whatsoever, no subsequent holder, however ignorant of the illegality, could acquire any rights against the maker as such. Take, for instance, the promissory note of an infant, or of a married woman, or of a person of unsound mind, could a subsequent holder of value, and who was ignorant of the age or the coverture, or the insanity of the maker—could such a person hold the maker liable? Unquestionably not, as every lawyer will admit. But, without further argument, let us look to the law and hear what it has to say.

In *Parsons on Notes and Bills of Exchange*, the law is thus stated: "Where notes are made void by express statute, they can not become good in the hands of subsequent holders; and upon no such note can a subsequent holder have a valid claim against the maker; but if he holds the note for value, and in good faith, he may have a valid claim against his own indorser, either as the maker of a new note or drawer of a new bill, or else upon the consideration which passed between them: Vol. 1, page 218.

Again, he says as follows: "The *bona fide* holder of a negotiable paper before dishonor, is not protected against those defenses which go to the *essence* of the paper, and either by common law or statute annul and avoid the contract or which interfere with and prevent his acquiring a legal title to the paper:" Vol. 1, page 275.

And be it understood, as we pass along, that bank bills are governed by the same principles of law. The same author (Vol. 2, page 107) continues as follows: "We would add that bank bills issued contrary to law or statute, or under an unconstitutional law, are void *ab initio*." For this principle, he refers to the case of *Root v. Wallace*, 4 McLean, 8; *Davis v. Bank of River Raisin*, 4 McLean, 387; and *Skinner v. Denning*, 2 Ind., 558.

And so we come back to the starting point: Are the circulating notes, known as the new issue, illegal because made to enable the Bank to carry on its ordinary business and to meet the checks of the Military Board, which checks it knew at the time were drawn to raise money to arm and equip the troops of the State? Are the circulating notes of the Bank, known as the new issue, void *in toto* for that infirmity? If so, it follows like the demonstration of a problem in Euclid, that these same circulating notes, known as the new issue, are now void in the hands of the present holders.

My next and last position is, that the "new issue" of the Bank of Tennessee is a debt incurred in aid of an insurrection or rebellion against the United States, and to decree that it is valid would be directly in the teeth of the 14th Amendment to the Constitution of the United States.

The latter part of the fourth clause of the said Amendment to the Constitution of the United States is in these words: "But neither the United States, nor any State, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void." \*

My position is, that to hold that this new issue of the Bank is a valid debt, is to nullify said amendment to the Constitution.

If the agreement of counsel is binding, and the facts therein stated are to be taken as true, then it is true that the new issue is a debt of the Bank, contracted in part to aid the State in arming and equipping its troops. Now this amendment to the Constitution says, that no such debt shall be assumed or paid either by a State, or by the United States, but such debts shall be illegal and void. The Chancellor, in his written opinion, which is published with this record, says, in the view taken by him of the facts, it was unnecessary for him to inquire into the force and effect of this amendment to the Constitution. And his view of the facts was, that the new issue *was not issued or paid out* in aid of the rebellion. It seems never to have entered into his mind to go behind the issuance or paying out and to inquire for what purpose the new issue *was made*. He also tells us, that it seemed to him, that it might well be maintained, that this amendment to the Constitution had reference entirely and exclusively "to the States and the United States, and was never intended by the framers of it to embrace *private* individuals, or to operate as between them, or between them, and corporations." I quote his very words and would not undertake to give the substance, because I do not know that I understand him. Had reference, he says, to the States and to the United States entirely and exclusively!! What does that mean? and what does he mean when he says that the amendment was never intended by the framers to embrace private individuals, or to operate between them and corporations?

I think that the extract I have made from the 14th Amendment to the Constitution of the United States is very clear, and ought not to be misunderstood by anybody. Its meaning is so patent that it ought to be apprehended even by a little child. It means just what it says, that no debt or obligation to an individual or corporation, whether due from an individual or a corporation, shall be assumed or paid by either a State, or the United States, if that debt or obligation was incurred in aid of the rebellion. Certainly the State was morally bound as much to pay the debt incurred by the Bank, in order to enable it to furnish the necessary money to arm and equip the troops of the State, as it would be to pay to individuals and corporations the value of their slaves which it had emancipated. No other words which could be added, would give either clearness or strength to this position.

If this "new issue" were made to aid the State, would it not be a violation of the said amendment to the Constitution to make the State, willingly or unwillingly, pay it? And if this Court were to decree, that, although the new issue were made

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\* Observe that this Amendment to the Constitution says, that all debts, obligations and claims "incurred in aid of insurrection or of rebellion against the United States" "shall be held illegal and void." In my previous remarks, I have argued that this would be so, upon general principles, because made against public policy. But this Amendment to the Constitution declares EXPRESSLY that they shall be held illegal and void. The authorities universally hold, that a note expressly declared to be void by statute, is a perfect nullity, and can be good in the hands of nobody. Of course this must be so. The Legislature of a State, and for a stronger reason, the Constitution of the United States, can rightfully declare that a Bank shall not issue any notes, and if they do, such notes shall be void. If that be so, then no one will deny that the Constitution may declare rightfully that a note issued by a Bank in aid of a rebellion, shall be held illegal and void, and no Court would have the power to declare that provision inoperative and void; otherwise the Constitution would not be the supreme law.

for the purpose I have stated, yet it was valid, would not the State thereby be made to pay it? Certainly, the new issue, by such a decree, would be placed on the same footing as the old issue. And we know that the Supreme Court of the United States, in the case of *Furman v. Nichol*, reported in 8 Wallace's Reports, decided that the State should receive in payment of its taxes the valid circulating notes of the Bank of Tennessee. And so this Court would decide that this State should pay a debt made in aid of the rebellion, and thus violate said amendment.

I have now made my argument. Before I take my seat, however, I wish again to remind this Court, that the Federal Supreme Court—that Court created to interpret the Constitution of the United States—has certainly decided, that it was unlawful in a citizen of any of the States to do an act, which, at the time, he knew was obtained from him to overthrow the Government of the United States, that to do the act, under such circumstances, would be a violation of his paramount duty which he owed to the Government of the United States, and it would be conclusively presumed against him, as a principle of law, that he intended and agreed to all the consequences which flowed directly from it. And herein lies the difference between the act of a citizen done in the United States, and the act of one not a citizen, and done out of the United States—the latter would owe no duty to the Government of the United States, whilst the former would, and his highest duty would be to uphold the Government of the United States, and to withhold his act if he knew it would be used against the Government. And I apprehend, that, upon examination, it will be found that most of the cases in which it has been held that the bare knowledge of the illegality would be sufficient, would apply principally to cases of smuggling.

And allow me also to ask, who are the holders of this "new issue," who pat so lovingly the back of the late Confederacy? Who are they, who pretend that their debt is of so meritorious a nature that it is meet that the people of the State should be heavily taxed in order to make them whole? Duncan and Atcheson, two of the holders, but who own but a small mite of this large claim, alone come to the footlights. The other holders still stand out in the shadow, afraid of the light. We know, however, that they are not the first takers, and that they do not belong to that class who received them for value whilst they circulated as money. No; these notes have long since passed out of the hands of the people, and have become the property of persons who bought them as merchandize, with a full knowledge of all the facts, and with the understanding to take their chances. They bought them at starvation prices—ranging from five cents to fifty cents in the dollar. Even Duncan and Atcheson stand in this category, and what shall we say of the skulkers now out in the dark? There may be (and we believe holders of this new issue to a large amount are) *non-residents*, and were and are the sneering enemies of the cause to help which this new issue was made. I do not wish to be misunderstood. Be they who they may, they are entitled to the benefits of the law just as it is written, but I deny that they have any right to our sympathy, and those feelings of love which make us hunt out and strain after points to uphold their cause.

On the other hand, allow me to ask, who are the depositors? I answer for them, and say, that the names of every one of them stand upon the books of the Bank, and most, if not all, are before this Court. They are the very persons who put their money in the Bank. They belong to all classes of the State—to the weakest and most helpless, as well as to those who are able to bear their cross. They were subjected to heavy and grievous wrongs and losses during the war. They had laid up in the Bank this money for their rainy day. They have been standing at the door for ten long years, and more, and knocking for their *own* in vain. Is it now, that they

are here before the highest tribunal of their State, too much for them to ask and expect, that the law, just as it is, and without prejudice or partiality, shall be administered to them?

### LAW IN LITERATURE.

In the *SOUTHERN LAW REVIEW* for January, 1874, may be found many references and examples showing that law and lawyers have generally fared very *unfairly* in literature outside of its own professional authors. This is because it was not understood by popular authors, or because the authors wished to please the popular opinion and pander to a mistaken notion. It is not surprising to us that when the law would convict and punish for witchcraft, and when torture was resorted to for evidence, and also as a punishment for those who were found guilty "by the Court," that popular opinion should take rather a gloomy view of its uses.

Many of the old proverbs were founded in their day upon truth, and those that denounce the law and lawyers may be true yet in some countries and under some governments, but this is only when the law's uses are, for purposes of Church or State, grossly perverted. We will cite some proverbs and extracts from poetry which can not be found in the article first above referred to:

In a thousand pounds of law there is not an ounce of love.—*Old Proverb.*

The law is not the same at morning and night.—*Old Proverb.*

The worst of law is, that the one suit breeds twenty.—*Spanish Proverb.*

A good lawyer, an evil neighbor.—*Old Proverb.*

Law can not persuade where it can not punish.—*Old Proverb.*

Lawyers' houses are built on the heads of fools.—*Old Proverb.*

Lawyers' gowns are lined with the wilfulness of their clients.—*Old Proverb.*

Law-makers should na' be law-breakers.—*Scottish Proverb.*

Law's costly, tak a pint an' 'gree.—*Scottish Proverb.*

Laws catch flies, but let hornets go free.—*Old Proverb.*

Law is a bottomless pit; it is a cormorant, a harpy that devours everything.—*Dr. Arbuthnot's History of John Bull.*

Law is a torment of all torments.—*Otway's Cheats of Scapin.*

Old rather antic the law.—*Shakspeare's Henry IV.*

Laws grind the poor, and rich men rule the law.—*Goldsmith's Traveller.*

The charge is prepared, the lawyers are met,

The judges all ranged—a terrible show.—*Gay's Beggars' Opera.*

"Law was designed to keep a state in peace,

To punish robbery, that wrong might cease,

'o be impregnable, a constant fort,

To which the weak and injured might resort.

But these perverted minds its force employ

Not to protect mankind, but to annoy;

And long as ammunition can be found

Its lightning flashes and its thunders sound."—*Crabbe's Borough.*

When an enlightened and great poet of modern times writes under the administration of the Roman Civil Law, which grew up and matured on the banks of the Tiber by the accumulated wisdom of the philosophers, sages and statesmen of Rome, he expresses a different view of the law. No more appropriate quotation can conclude this article than what he says of it:

Law, man's sole guardian ever since the time when the old Brazen Age in sadness saw love fly the world.—*Schiller's Walk.*

—*N. Y. Daily Register.*

## THE NEWSPAPER IN AMERICA.

Among the very few contributions from America to the Vienna Exposition, which mitigated in some measure the poignancy of our disgrace there, was a collection of about six thousand specimens of American newspapers. There was something genuine and thoroughly characteristic in this display of a force for which the New World is so greatly distinguished, and very justly the collection attracted to itself the admiring notice of nearly all intelligent visitors, and very fairly won the "Medal of Merit" that was awarded to it by the International Jury. It would be most ungrateful for us to forget that the credit of a contribution which did so much honor to America, at a time when even a little honor was particularly hard to be got, was wholly due to the public spirit, sagacity, and invincible industry of our German fellow-citizen, the well-known publisher, Mr. E. Steiger.

We have recently received from Mr. Steiger a finely printed copy of a catalogue of his now celebrated collection. The catalogue embraces the names and brief descriptions of about three-quarters of the newspapers published in this country, and quite well deserves its title of *The Periodical Literature of the United States*. The value of the catalogue is greatly increased by the indexes which are appended to it. The principal index relates to the subject-matters of the various newspapers included in the collection, in which the sub-divisions are so minute as to produce four hundred and seventeen different headings. Each of these headings Mr. Steiger gives in six languages—English, German, Dutch, French, Italian, and Spanish, "in order," as he says, "to put the information contained in this catalogue within the reach of the whole world." Thus, Mr. Steiger's book has a cosmopolitan scope, and is likely to spread into many lands the fame of the vigor and vastness of American journalism.—*Christian Union*.

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## *HOMICIDE AND THE DEFENSE OF INSANITY.*

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The criminal law of a country is a mirror in which the civilization of that country is faithfully photographed. The savage law inevitably springs up, a natural growth, from a savage people; weak and unreasonably mild laws, from a weak and hesitating people; while a firm, evenly poised code, dealing out sure, certain, but proportionate, punishment for the infraction of its provisions, is sure to be the result of a high state of progression, working in harmony with a high standard of national morality. Couchatimacho, an Indian chief of the Creek tribe, whose town was on the banks of the Chattahoochee, on the boundary line of Alabama and Florida, for the offense of bigamy, had his nose cut off, and was afterwards seen by some citizens, who are yet living, wearing an artificial nose made of beads. The old English law books teem with such harsh words as "drawn and quartered." Not many centuries ago a charge of criminal conduct was allowed by law to be settled by wager of battle, thereby giving national acknowledgment and support to the exploded theory, "might makes right."

This was but the legitimate fruitage of that great underlying necessity which called into life, and subsequently held together, those vast and semi-lawless organizations of knighthood, which constituted the most singular and attractive phenomenon of all past ages.

The middle or historic dark ages, especially the latter part, in their history typify that age when men loved humanity and humane laws, but judged erringly of that in which such laws consisted, when they should be enforced, how far, and when to cease, and enforced them with a rigidity, and to an extent, which defeated the cherished object.

The Tartars, a warlike race of nomads, under Gengis Khan, held it a capital crime to strike a horse with a bridle, yet they admitted robbery, and even murder, to go unpunished. (See Carpin's Letters, written 1246.) The laws of Sparta once made thieves of the youths of that hardy people by compulsion; and the Aztecs, as a part of their criminal code, as well as a religious service, sacrificed prisoners of war and domestic offenders in the most brutal butchery. The dark moral ages of the world, with their varied changes can be clearly traced along the shores of time by the measure of punishment meted out to the offenders of the law. The laws of Catholic Europe, sanctioning the inhuman torturing of spiritual offenders in the Shevian days of the fourteenth, fifteenth and sixteenth centuries, stamp with photographic correctness upon that age the impress of dark and unmerciful bigotry. Even our own America, the far-famed "land of the free and home of the brave," has witnessed the strange spectacle of a mortal, erring as perhaps all do, expatiating upon the scaffold the supposed offense of witchery.

All governments are but the aggregate public sentiments of the people over whom they exist; and all people act as the moral and intellectual lights before them prompt. All the various human necessities being equal or normal, the criminal code of a people will be a type of their mental and moral status, as faithful as the echo to its mother sound. Of course, when a crisis has been reached in the affairs of men, the dread of change in one and the desire for revolution in another, the active vital interests of each member spurring him into an abnormal activity, lay low the barriers of cool judgment, and may, in the hour of heat and frenzy, create a being which, like that of Frankenstein, amazes its creator by its malignant magnitude. Such hasty acts are the proper fruits of that universal law of nature which has been frequently called "change and decay," but which should properly be termed *action and reaction*.

A violent impulse driving us to action beyond what the real exigencies of the occasion require, calls for a corresponding reaction, which again becomes a primary action to give birth to a second reaction, and so on *ad infinitum*, but modified ever by judgment and the concurrence of circumstances. The sum total, then, of human accomplishments, is the result of aggregated action and reaction. Even man himself is in his material organism but  
this theory. His creation and growth to manhood's prime

is the result of a *chemical action*, his decline and death of a *chemical reaction*. Attraction and repulsion, or action and reaction, are the two great vital universal powers of the material world.

In excitements of an universal character which bring out the conflicting elements of a community, any unwise law may be enacted as its offspring. There is no rule by which to determine in what direction a chopping sea will ultimately direct its current. So, when public bodies become as a chopping sea by reason of many conflicting interests and counter-currents, it is impossible to foretell the result. Hence, such acts not being the exponent of the true status of the people by whom it was inaugurated, must be admitted as exceptions. Yet the rule stands. A celebrated man once remarked that he could tell a people by their school-houses and grave-yards; he might have added, a nation is known by its criminal code.

Criminal law is, of course, not the only mirror in which we see ourselves nationally or publicly; the civil municipal law sometimes furnishes a true criterion. The usury laws of the various States furnish a splendid illustration. And here we would remark, that this last mentioned class of laws presents one of the most striking illustrations of that infatuation which bows the mind in adoration to antiquity. Here we see modern progress recognizing the fungus growth of a barbaric age, the spurious offspring of a misjudging and misguided spirit of humanity. The law on the production of evidence is also a good illustration. But the most obvious and unmistakable deduction is forced upon us by the exemption laws. In Alabama (and I presume in most of the States), this branch of our system has been growing continuously from the day she became a State. It will be remembered that in the not very distant past in England, from whom we borrowed much of our laws, the "Insolvent Debtor's Act" was passed to release from imprisonment for debt. That acts amendatory and supplemental followed both in England and America, enlarging the privileges of the debtor and restricting the power of the creditor, is an undisputed question of legal history. At first, Alabama allowed a small exemption of specific articles, such as was almost absolutely necessary to enable the debtor's family to sustain life. Since the close of the war between the States, we have had, part of the time, an exemption covering as much as five thousand dollars' worth of property. The Legislature at its session of 1872-3, being disgusted with such a pet monstrosity of executive, legislative and judicial demagogues,

by what purports to be a declarative statute, limits and restricts this overgrown branch of our jurisprudence. Lest I may be taken to task for using the expression, "judicial demagogues," I will refer to my authority. See the unwarranted *dictum* of Justice Peters in the case of *Kimball v. Greig*, 47 Ala., 230, on this branch of law, and his opinion in *Webb v. Edwards*, 46 Ala., 17. This latter decision is a construction of the exemption statutes, which he expounds, if not in so many words, at least substantially, by the rule obtaining in the construction of remedial statutes, liberally expounded, to suppress the evil and advance the remedy. What evil is to be suppressed? Justice Peters says, the liability one is under to pay his honest debts. What is the remedy? To virtually repudiate his contracts, take shelter under the law, and allow just debts to go unpaid. Such is substantially the spirit of the decision cited.

It will appear by a glance that this false humanity towards debtors has been gaining ground until it has assumed wonderful proportions. But its pace has been rapid only to keep step with universal suffrage, until to-day it assumes the phase of offering a premium for dishonesty. Demagoguism being one of the chief elements in our political intercourse, and obsequiousness and plunder in office the order of the day, those sentiments seem fixed in the body of our laws, pandering ever to the unjust whims of a mistaken people, and loading down the best interests of the country with a self-assumed burden for which there is no necessity.

But these are merely offered as evidences going to prove our general proposition, that the code of laws of any people, and especially the criminal code, is a stereotype of the civilization of that people.

The application of this principle to the branch of law upon which we propose to base this article, must be, from its peculiar nature, strikingly obvious to every one. For of all branches of our jurisprudence, none so thoroughly enlists the sympathies of mankind as that wherein the heaviest and severest punishments are inflicted, and none other is so infallible a guide to the absolute status of civilization.

My original intention was not to write a general disquisition on the spirit of laws, but merely to point out a few of the most comprehensive landmarks of the substantive crime of homicide, extended only so far as is necessary to properly understand the defense of insanity. I speak only of homicide, because whatever rule applies

to this defense, under a charge of homicide, will be equally available under an indictment for any other crime. I say this is the rule, yet in the several States there may be, and doubtless are, departures therefrom, resulting either from the tendency of the public mind operating upon the judiciary until the old landmarks, or at least the original rule has been left, or by State statute. It is difficult to see how this rule should have an exception, since the crime consists not more in the act than in the intent with which the act is done. The intent has always been held to be the *gravamen* of crime, but in those cases where the intent may be *general* as contradistinguished from *specific*, the exception may possibly find somewhere to rest.

The law of homicide, with its distinctions at common law, is not very extensively useful in this State, since we have a statute drawing the distinctions between the several grades.

The first most natural division of homicide is into: 1. Murder. 2. Manslaughter. 3. Justifiable homicide.

Murder is again subdivided into murder in the first and second degrees. By statute, in Alabama, "every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing, or committed in the perpetration of, or the attempt to perpetrate any arson, rape, robbery or burglary, or perpetrated from any premeditated design, unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree:" Revised Code, Section 3653.

"Killing by fight in single combat, commonly called a duel, with deadly weapons, is murder in the second degree:" Revised Code, section 3655.

"When the killing, in a sudden rencounter or affray, is caused by the assailant by the use of a deadly weapon, which was concealed before the commencement of the fight, his adversary having no deadly weapon drawn, such killing is murder in the second degree, and may, according to the circumstances, be murder in the first degree:" Revised Code, Section 3656.

Murder at common law is defined to be when "one of sound

mind and discretion unlawfully kills a reasonable creature in being with malice aforethought, either expressed or implied:" Black. Com., Vol. 4.

The act must be committed by "one of sound mind and discretion," for no lunatic, *non compos mentis*, or infant of very tender years, can commit this offense. The investigation in the case of the infant is addressed to the *doli capax*, or power of discerning the evil of the act. An infant of eight years was executed for the murder of his playmate, the hiding of the dead body being considered, on trial, ample proof of the *doli capax*. As to that part referring to the defense of unsoundness of mind, I will only here observe that it will be referred to hereafter.

The killing must be "unlawful," for otherwise, a high sheriff would be guilty of murder in executing the death penalty upon a convict.

It must be also a "reasonable creature in being," for at English common law a child *in ventre sa mere* was not the subject of murder, but if killed by the administering of drugs, abortion, or the like, it was a very high misprision. But in this State it is murder to kill a child quick *in ventre sa mere*, if the other necessary elements of murder are present.

The old English law books also held that the slain must be "under the king's peace," which meant nothing more than that he should be under the protection of the law. An alien enemy might, at common law, be slain without violating the law against homicide.

The most noted element in this offense is the "malice aforethought" with which the deed is committed. This is the element which distinguishes murder from all other classes of homicide. This "malice aforethought," or *malitia precognita*, is divided into malice *expressed* and malice *implied*. The first is when, by some external evidence, the specific design is made manifest. To slay in a duel is an instance of expressed malice, and was, at common law, murder, and might be murder in either degree, as the circumstances in each case might determine.

In Alabama, the common law is so far modified that such killing is murder in the second degree only, and can by no possibility be made murder in the first degree, while the statute stands unchanged: Revised Code, Section 3655.

A general or implied malice is where it has no specific object, but is evidenced by a sweeping disregard for the lives and liberties of all men, and a fixed purpose to do an injury to some one, without specifying. If one discharge his gun into a multitude whereby

another is killed, this is murder; the malice being implied from the general malevolence of the act, although the party firing may not know the slain. Should the circumstances of the killing show the slayer to have been actuated by a sweeping malevolence to all mankind, or that he was an enemy to all the human family, the law will from such circumstances, in the absence of rebutting proof, *imply* the malice and hold him guilty of murder. When the implication of malice is sufficiently strong to convict the accused of murder, it may be murder in the first degree as well as in the second, for the distinction between expressed and implied malice has no bearing upon the several degrees of this great crime.

The laws of Alabama have peculiarities, perhaps, as compared with those of other States of the Union, growing out of the peculiar statutes of each State, and perchance from a difference in the tastes and genius of the people. But the changes or differences from the latter cause must be very slight, scarcely enough of themselves to be called a change. So far as the great underlying principles are concerned, these changes are mere songs and nothing more.

In this State the criminal common law is identical with in most instances, and in all others drawn from, the great body of the English law. If that law requires a certain thing to be done as a condition precedent, either criminally or civilly, in general our law requires the same. It has been heretofore held that when the English common law required one to retreat as far as possible, and decline a combat when assailed, our law required the same: *Pier-son vs. The State*, 12 Ala., 149.

But while this is *res adjudicata* in this State, it takes no great extent of prophetic vision to see at no distance a change of material purport involving this principle. The same spirit which changed the common law when it would not justify a battery, or striking, for abusive words or opprobrious epithets, and allowed such provocation to be given in evidence on the trial for an assault, assault and battery, or an affray, in extenuation, mitigation, and even in justification of the penalty, has been breathing into the Legislature and Judiciary a new spirit. Opprobrious words may, in Alabama, under some circumstances when uttered by the slain immediately before the killing, be looked to by the jury for the purpose of lessening the offense from murder to manslaughter.

The case of *Flanagan vs. State*, 46 Ala., 703, seems to me to rise higher in the social elements, and to give earnest of a change in the harsh rules of common law to a greater extent than any in this

State. Though tested by that rigidity of construction which regards as *res adjudicata* only that which was decided upon a point necessarily involved in the record, yet it goes far to mollify the harsh spirit of ancient times, and to put the criminal law upon a footing in harmony with the intelligence and humanity of the age. It prognosticates an era in the jurisprudence of this great commonwealth whose advent would be hailed as one of the most healthy symptoms of this age, replete as it is with those of an unhealthy character. No doubt can be indulged for a moment of the purity of the spirit animating that decision, and we may sincerely trust that the day is not far distant when the law will so hedge around the lives and honor of the citizens that such provocations may even amount to a justification when pleaded by the accused. The case of *Bohannon vs. Commonwealth*, 8 Bush., 481, (also found in 8 American Rep., 474,) is also a case which pioneers a more liberal system of criminal jurisprudence. I do not mean by the use of the term "liberal" that they are or should be so lenient as to discharge every person charged with crime, but that liberalism which secures to men government by law in harmony with the genius and spirit of an enlightened age, or at least, of the age in which they live; a liberalism as far from promoting by its laxity a disregard of the liberty of the person, as from the victimizing a man, innocent in the eyes of social tenets, through the stubborn and unrelenting rules of a people whose customs were not ours, whose government was not ours, whose circumstances were not kindred to ours, and who centuries ago passed off the stage of human events forever. The case of *Flanagan vs. State*, *supra*, was about as follows: Flanagan appeared late in the evening at a store where several persons were assembled, wearing a slouched hat and overcoat. He asked if any one had passed, and was answered in the negative. In a few minutes a horseman approached, when Flanagan walked into the middle of the street, and as the horseman drew near peered into his face as if to see who he was, and immediately commenced firing at the rider, who fell and soon died. Flanagan was immediately arrested by a policeman who made a remark to the prisoner that he regretted not knowing him sooner, to which he replied, "Yes, if you had I would not have done what I wanted to do." Flanagan offered to prove upon the trial in the City Court of Mobile, as a motive for the killing, that the slain had deflowered a young sister of his under pretext and promise of marriage; that he had been summoned from Selma to attend the marriage, and that the

slain had written his sister a note to the effect that he would not marry any woman whom he could seduce. All this information had been imparted to Flanagan only an hour or two before the killing. The Court would not admit the evidence offered, when, on appeal to the Supreme Court, it was held to be error and the evidence admissible to reduce the offense to one of the lower grades of homicide, to be determined by the jury.

This can not be reconciled with the letter of the common law, and must be construed as one step, at least, towards its modification.

Malice has been implied, in this State, from the killing of an infant by its mother, who beat it on the head with an instrument calculated to produce death, but the Court says that such implication would not be usually indulged if the child was capable of taking her life, and was attempting to do so with means adequate to the accomplishment of that end. So, if one attempting to commit a felony kills another, beyond his intent, it is murder; but if he were only attempting to commit a misdemeanor, as a mere civil trespass, it will be manslaughter. So when one takes life with a deadly weapon the law presumes that it was done with malice, and imposes upon the accused the burden, or *onus*, of rebutting this presumption. But, to this must be added the qualification that the rule is correct as stated, unless the evidence which proves the killing shows it to have been done without malice. No words of reproach, however grievous, provoking action or the like, unconnected with an assault upon the person, will justify a killing, or make it any the less murder; and for a stronger reason this is true when the slayer uses a deadly weapon, or otherwise manifests an intention to kill or do some great bodily harm: *Morris vs. State*, 25 Ala., 57. A mere civil trespass upon a man's house or premises, unaccompanied by such force as would make it a breach of the peace, is not sufficient provocation to reduce the killing to manslaughter, if committed with a deadly weapon and under such circumstances as that the law would therefrom imply malice: *Carrol vs. State*, 23 Ala., 28. If the trespass is forcible, the owner may resist the entry, but he has no right to kill the trespasser unless it is rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or limb, or great bodily harm; and the danger to his life, limb, or of the great bodily harm, must be imminent or impending; or, at least, must be of such a character as to create in the mind of the slayer the honest impression that the

necessity to kill to save himself from such loss is imperious and pressing; and yet if either of these real or apparent necessities exists, and it clearly appears that the killing was done with malice, either expressed or implied, it will be murder. Some of the law books hold that the circumstances must be such to justify the slayer as would create in the mind of a reasonable man the apprehension that the necessity for killing was imperious. Such, I submit, cannot be just, nor can one be brought to the conviction that such is a sound exposition of the law.

The incorporation into the definition of the term "reasonable" seems to me to superadd a new element unknown to the policy and spirit of criminal law. Suppose the accused be not a "reasonable" man in a conflict, yet *honestly* believes such impending danger requires him to strike for the preservation of his life, the circumstances would be no justification because he did not look at them as a reasonable man would. This would be to convict and punish him because he was not more than a wise Creator made him. Surely, in justice, he would not be guilty, although a "reasonable" man might not have thought the necessity urgent, when he, exercising his best judgment, honestly thought that it was so urgent as to legally permit him to slay his adversary. Since the intent is the *gravamen* of the offense, it appears that an *honest* impression that such necessity existed is, or at least ought to be, sufficient to acquit the slayer. If several participate in a murder by preconcerted arrangement, and another not privy to such common design participates, he is not, as a sequence to the guilt of the others, a murderer, but may be so held if the circumstances warrant such finding when taken independent of the common design originally existing among the first conspirators: *Frank vs. State*, 27 Ala., 37. If one sees another about to perpetrate a felony he may use force if necessary to prevent it, and if while so engaged he is intentionally slain, it is murder; so if one deliberately kills another to prevent a mere trespass upon property, whether such killing was necessary or not to prevent such trespass, it is murder; but if the trespass be to the person of the slayer, and no specific circumstances intervene to show malice aforethought, it will be held manslaughter only. One may resist an assault upon his person but must not use force greatly disproportionate to that used towards him; or in other words, he is allowed to *defend* himself, and nothing more. If he is assaulted with the hand merely he is not justified in shooting, except, perhaps, where the assaulting party was greatly above the size and physical strength of the

assailed, and was a man of great recklessness of action, and dangerous in difficulty; then, probably, the assaulted would be justified in using a deadly weapon. If the use of such a weapon was, in his *honest* opinion, absolutely necessary to defend himself from death or great bodily injury, he would be protected by a wise law. All criminal law allows such resistance to be made as is necessary to a defense of the person. But here another distinction interposes. When there is a reasonable apprehension that only a trespass will be committed upon either person or property, it will not justify a killing; but when the attack would amount to a felony, then the killing may be justifiable. So, when death results from a wound, within a year and a day, the person inflicting it is responsible for its consequences, although the deceased might have recovered by the exercise of more care and prudence. But if the wound be not dangerous in itself, and the death which ensues was evidently occasioned by the grossly erroneous treatment of it, the original author will not be accountable as for murder; but if the wound was in itself mortal or dangerous, the person who inflicted it can not shelter himself under the plea of erroneous treatment. If the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated because death might and probably would have been the result of a disease with which the deceased was afflicted at the time of the violence: *State vs. Moreo*, 2 Ala., 275. The proof showing the commission of a felonious homicide perpetrated by the accused by lying in wait, he offered evidence that deceased had often threatened his life, and the day before the killing had lain in wait in the woods to shoot him, and that this was known to the accused before the killing; but accused also stated in reply to a question from the Court, that he did not expect to show any act done by deceased at the time of the killing indicating an intention to kill accused or do him great bodily harm, but that he did expect to show such act on the part of deceased as late as the evening before the killing, and thereupon the Court rejected the evidence; it was held that the evidence was incompetent either to justify or excuse the homicide, and as that was the only purpose for which it was offered the evidence was rightfully excluded: *Hughey vs. State*, 47 Ala., 97. But any fact which tends to show the real motive of the accused in killing the deceased is relevant evidence, whether offered in prosecution or defense: *Flanagan vs. State*, *supra*.

The case of *Bohannon vs. Commonwealth*, *supra*, seems to conflict slightly with the case of *Hughey vs. State*, *supra*. Here the deceased,

Cook, was shown to be a man of lawless habits, overbearing, vindictive and revengeful, and very resolute in the execution of his plans of vengeance against those who had incurred his displeasure; that he was at the head of, or at least belonged to, a band of lawless men, secretly organized; who set the law at open defiance, and whose members committed crimes upon persons whom, they charged, were themselves criminals and beyond the reach of the laws of Kentucky. Cook had, some months before his death, become hostile to Bohannon, avowing himself to be his enemy, and several times openly threatening to take his life; all of which threats were communicated to Bohannon. Two days before the killing, Cook, with a confederate, made an attack upon Bohannon, who saved himself by deserting his horse in the road and concealing himself in a field. Cook made threats on that occasion to others, that he intended to kill Bohannon on sight, which threat was communicated to Bohannon on the night following. On the morning of the killing, Cook was trying to get a third party to ascertain for him Bohannon's whereabouts, stating that he was anxious to get the information. On that morning Bohannon left his house for the first time since the first assault, taking with him a double-barreled shot gun, and soon met Cook in a railroad cut near the village of Bagdad. Two shots were heard, but no one saw the rencounter. Cook was found a few minutes afterwards lying dead, with a revolving pistol about half way out of his pocket. On the trial the Court charged the jury, "that they can not acquit the defendant on account of any danger, real or apparent, not existing, or not on reasonable grounds believed by the defendant to exist, *and to be about then to fall upon him at the time of the killing.*" This was held to be error as infringing the true spirit of self-defense, and the Court go on to say "that the threats of a lawless and desperate man do not authorize the person threatened to take his life, nor does any demonstration of hostility short of a manifest attempt to commit a felony justify a measure so extreme. But when one's life has been repeatedly threatened by such an enemy; when an actual attempt has been made to assassinate him, and when after all this, members of his family have been informed by his assailant that he is to be killed on sight, we hold that he may lawfully arm himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose; and if on such an occasion he casually meet his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he

does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has the right to believe that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast; nor has he a right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he should give up his business and abandon society to avoid such a meeting."

This decision has the true ring of progressive justice, and enunciates a sound principle of human conduct and accountability. The old common law retreat-to-the-wall, or run-if-you-can, doctrine must go down before the superior humanity and profound wisdom of this doctrine. Under this decision one may not be forced to drink too deep of the cup of humiliation that he may obey the law. It is of but little use to permit the assailed to draw his weapon to protect himself only after his assailant has his pistol leveled at his head, or his knife in close proximity to his heart.

The examples of this offense may be carried to an almost indefinite extent; in truth, it is as susceptible of varied illustrations in its many phases as there may be changes in the vast intricacies of human relationship.

Manslaughter is the unlawful killing of another without malice: 4 Blackstone, 191. This homicide differs from murder in that malice is not an ingredient of this offense, in it is wanting the presence of that unlawful and most abhorrent element in murder. Manslaughter at common law was either voluntary upon sudden heat, or involuntary, or unintentional, but in the commission of an unlawful act. If, upon sudden anger, two fight, and one is slain, this is voluntary manslaughter. So when they go out to fight in a field; for the law says it is manslaughter when the sudden heat of passion has not had time or opportunity to cool. When two are friends suddenly grow angry and fight, and one stabs the other to death, while the use of the deadly weapon, standing alone, would raise the presumption of malice sufficient, if unexplained, to make the act murder, yet the circumstances of the killing would so far explain the use of the knife as to allow no operation for the legal presumption, and it would be held voluntary manslaughter.

Involuntary manslaughter is where the killing is unintentional'

and results from the performance of an unlawful act, which, if performed, would amount to a misdemeanor, or mere trespass. When committed in the performance of any act felonious in its character, it is murder. If the act tended to bloodshed, it will be at common law, murder.

In this State, "manslaughter by voluntarily depriving a human being of life, is manslaughter in the first degree; and manslaughter committed under any other circumstances, is manslaughter in the second degree:" Revised Code, section 3659.

Homicide is still further subdivided into excusable and justifiable homicides. Murder and manslaughter belong to the class of *felonious* homicides, which we have briefly noticed, and from which we will pass to the consideration of those which are justifiable and excusable. To the former no guilt whatever is attached, and to the latter, so slight, if any at all exists, that the law, in regard for the frailties of human organism, will excuse.

When an officer, *virtute officio*, executes a sentenced convict, if done in legal manner, and at the time ordered, it will be a justifiable homicide. It must be done to satisfy the requirements of the law, to vindicate and preserve the outraged majesty of society.

If such officer were ordered in the manner prescribed by law by judgment of a Court having jurisdiction, to execute a criminal by hanging, and such officer should behead him, this would be murder in the officer.

Excusable homicides are of two sorts, either *per infortuniam*, (by misfortune), or *se defendendo* (self-defense). To the former belong those accidental killings which flow out of the performance of a lawful act.

The law of self-defense commends itself more to the careful consideration of the legislator and legal expounder than any branch in the whole range of that almost infinite science. In the multiform and multitudinous relations of to-day, it constitutes a question not only of magnitude, but of peculiar difficulty. Difficult, because the line of separation between this defense and murder is of the frailest dimensions in many instances. All of our ideas of justice and natural right, are in complete sympathy with the right of self-defense, but where this ceases and aggression commences is frequently a question of difficulty. As before said, and abundantly decided, this necessity may not be real, but is sufficient if honestly thought to exist by the slayer. The law of self-defense rests not more upon the idea that the assailed may slay because less guilty in

bringing about that state of facts necessitating the killing, than upon the indulgence which the law shows to the frailties of human organism. Extreme terror may cause one to imagine that his life was endangered, and thereupon slay an innocent man. This might not be called a "reasonable apprehension," yet it might be such an apprehension that it would take from the slaying all of its criminality—the malicious intent. We should remember that in all cases of homicide, the intent must appear to have been in existence, going along with the act and giving it its character. Generally the criminality of an act is in direct ratio with its immorality.

The rule of evidence is universal that the *onus probandi* is upon the State to prove the allegations of the indictment. The law presumes every man innocent until the contrary is proven beyond all reasonable doubt. A wide difference prevails between criminal and civil cases with respect to the *onus probandi*. In the latter case the plaintiff may rest his case upon a preponderance—the merest *prima facie* showing, the law in most instances determining what is and what is not a *prima facie* case. But in criminal law the *onus* is upon the prosecution, and is never shifted and the burden thrown upon the defendant, except in some very exceptional instances. What is a doubt sufficient to acquit, is the province of the jury to determine. The *prima facie* case may, in civil suits, be destroyed by conflicting evidence destroying the preponderance, but in criminal cases the State is required to prove beyond all reasonable doubt the facts which constitute the offense. The establishment of a *prima facie* case merely, as in civil suits, does not take away from the defendant the presumption of innocence, but leaves it to operate in connection with and in aid of any proof offered by him to rebut or impair the *prima facie* case made out by the State: *Ogletree vs. State*, 28 Ala., 693; *State vs. Morler*, 2 Ala., 43. This doctrine will hereafter be referred to in connection with the plea of insanity. The rule that the evidence is to be so strong as to exclude all reasonable doubt is not satisfied by a mere preponderance of probabilities. Hence, there can be no such a state as a legal equipoise in the effect of the evidence on criminal trials. The equipoise would destroy the conclusiveness of the proof and admit the "doubt," which must not be a captious or whimsical creature, but must be actual and substantial, and not mere possibility or speculative. It is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after t<sup>h</sup>

entire comparison and consideration of all the evidence, leaves the minds of the jury in that condition that they can not say they feel an abiding conviction to a moral certainty of the charge:" *Mose vs. State*, 36 Ala., 211. We are now brought down to the last branch of our subject, *The Defense of Insanity*.

Here a field opens as broad as the range of the utmost flights of fancy, the dreams of imagination, or the powerful deductions and inductions of reason can circumscribe—yea, broader. Every change in the many relations which, with their millions of varied interests, constitute the social net-work of a civilized people; every evolution of scientific knowledge; every shade of moral and religious sentiment; all these, and, in fine, all things which concern human action, are competent to change this branch of jurisprudence. It is hard to conceive of a field more fruitful in themes of sentiment and reason than this. It is impossible to stand in the presence of a clear intellect and note its wondrous machinery in a systematic play unrivalled in its harmony, or to hear the wild and disjointed mutterings of a disordered brain, without, at the same time, feeling that we are in the presence of a subject awfully sublime in its infinite intricacy. If there is anything of the terrestrial infinite about us, it is the play of this mysterious agency. In contemplating it in connection with the affairs of life, we are led back to the fruits and scenes of its early labors, and paraded before us, panorama-like, is the history of the world, checkered with its many coronations of success and burials of cherished hopes. The Past, the charnel-house of ambition, and History, the monument of all departed time, bear their tribute to the great store of sensations which overpower the very soul with their presence. It matters nothing with us in this investigation whether any particular limit of theology of the soul or mind be true. With us it is the same, whether the mind is a spark from the eternal intelligence, shut up in this prison-house of the body, or whether it is merely the resultant of a chemical evolution originating from the peculiar local or scientific relation of the material elements of the body, springing into existence as the affinity of those elements undergo the necessary changes producing development and growth, and dying—like the poor candle snuffed out—when that affinity has ceased, and repulsion shall have consigned its victim to the tomb. It is the same agency despite all theories, wondrous and impossible of absolute comprehension. Thought can not encompass its parent brain, else the created is greater than the Creator.

We must bring to our aid not only the history of the mind as developed in the various stages of past civilization, but also the lights of Phrenology, Physiology, Biology and Psychology, and, in fine, we must gather all the light of ancient labor and modern acumen that our investigation may approximate truth. Such investigation is necessary to fully understand even what the little modern *savans* know of the mind. I use the term "approximate," because it would be a foolish arrogance to say that science as we have its laws written is properly understood. We dare not deny the possibility of a discovery within the near future which will upturn our pet theories, and change the old landmarks of science. But while these branches of scientific research are thus subject to revolution, we must not discard them, but use them since they are correct, so far as we know, and may be absolutely true. We take them with reliance upon their theories, and will discard them only when proven to be fallacious.

Since the intent with which an act is performed constitutes the *gravamen* of the crime, the basis of criminal law must rest upon our ideas of the springs of human action. An action coupled with no criminal intent is not a crime, and while from the act, in some cases, that intent will be presumed, the presumption is not conclusive, but is subject to be overturned by any competent evidence showing that such intent was wanting. It, of course, would be absurd to charge one with a rational intent when his brain, the workshop where the intent is manufactured, is chaos and utter confusion. When one is the creature of impulses over which he has no power, when he is a mere bark drifting without rudder or compass at the mercy of whimsical winds, knowing not good from evil, or driven by the resistless power of an uncontrollable emotion, it would not only be out of the province of the law to subject him criminally for an act, but would also shock all senses of humanity.

The law, though much abused by those who do not understand it, is full of the milk of humanity. Whenever there is an evil without fault on the sufferer's part, and the remedying thereof will not work a hardship upon another innocent party, the law will give him a remedy for the ills he bears. It is also ever mindful of the frailties of human nature, and in no branch of law is this claim more beautifully vindicated than in its dealings with those whom God's decree has deprived of their reason. When an insane man slays an innocent party without provocation, neither public necessity nor justice demands his execution. The law recognizes that

while murder is horrible, the blood of the slain calls not from the earth, that the evil can not be remedied nor any demand of justice satisfied by the shedding of other blood legally innocent. It must go to the chapter of accidents and irremedial ills of which we are all such bounteous heirs. The evil is as much guarded against as is possible, for upon the coming in of a verdict of insanity, the insane is confined until cured of his malady. In some States the practice is to try the issue of insanity first and apart from the issue upon the indictment.

First, let us ask what is insanity? The question is much easier asked than answered. In truth no one, perhaps, will be found hardy enough to hazard a definition with the promise that it shall be entirely accurate and comprehensive. Not grasping thoroughly the mental and physiological organism of man, in all their multi-form relations, it is impossible to give an arbitrary definition of insanity in its fullest scope. I use the term "insanity" in a generic sense, to denote all those conditions of the mind differing or departing from that of sanity. And it matters not whether this be caused by direct or indirect influences; whether from a disease of the brain—the workshop of thought—or from the pathological or sympathetic connection of the otherwise healthy brain with a diseased portion of the system, provided this connection is so strongly influential upon the action of the brain as to produce abnormal action, or abnormal results. Insanity, then, to be brief, as we must necessarily be at the expense of minuteness, accuracy and comprehension of detail, is an abnormal state of the mind; and, for the purposes of this article, such a condition as renders one insensible of the right and the wrong, or leaves him powerless to make a choice between them. Almost all insane persons have an idea of abstract right and wrong, but they as frequently mistake the facts of the two opposite conditions as otherwise. Yes, I may add, since a correct comprehension of the province of the two conditions is the result of a healthy mental operation, that the product of an unhealthy mental operation is a reversed result.

I do not ask, nor shall I expect world-renowned metaphysicians like Wayland and Hamilton to subscribe to the above as a definition, nor is it offered as absolutely correct as a scientific proposition, yet for the purpose of simplifying the application of this most abstruse science to the requirements of the criminal law, it is deemed sufficient when taken with what will hereafter be said.

The law of England recognizes two states of mental alienation:

*dementia naturalis*, or idiocy; and *dementia adventitia*, which is general insanity as it occurs in persons who have enjoyed reasoning powers. The term *lunacy* is frequently applied to this latter class of cases, and was so called from a superstitious notion that it was in some manner under the influence of the moon; and it is loosely used by lawyers to denote those mental conditions technically called by medical men *mania*, *monomania* and *dementia*. The term *non compos mentis* is invariably used without a definite idea of the extent of its scientific meaning, and from the text books before me I have not been able to give anything more practical or definite without incurring the risk of becoming involved in numerous inconsistencies. Some medical writers have attempted to draw a distinction between *insanity* and *unsoundness of mind*. If such a distinction exists it is arbitrary; a mere abstraction and useless for the purposes of the present investigation.

Medical jurists usually treat insanity under four different forms: *mania*, *monomania*, *dementia* and *amentia*. Upon reflection, I am inclined to think this division artificial, but yet, if so, it seems to serve the purposes of medical jurisprudence, and is perhaps subscribed to by many writers out of regard for Esquival, the celebrated Frenchman who invented it. As in all other sciences, with a variety of subordinate branches, it is difficult, frequently, to say of a mental alienation to which of these divisions it properly belongs, and at other times one may be presented which partakes of them all.

A noted psychologist suggested the division of insanity into two heads: *incoherency* and *imbecility*. The former appears to be a mixed state of *mania* and *dementia*; while imbecility is that state susceptible of cultivation to a limited extent after birth, without reaching a normal standard.

*Mania* is a form of insanity wherein there is a general derangement of the mental faculties. The external evidences are always competent to be considered in determining to what class a given subject belongs. In this one there is always more or less excitement, ranging from that mild type which requires careful study to detect, to the most unbridled fury. Subjects frequently labor under *illusions* and *hallucinations*. It would be proper, perhaps, though not necessary, to add that the former are sensations produced by the false perception of objects, while the latter are sensations which are supposed by the patient to be produced by external impressions, although no natural object may act upon the senses at the time.

When one fancies that he hears noises where there is profound silence, he labors under an *hallucination*; when he sees an object as green when it is white, he labors under an *illusion*. These impressions may sometimes be removed by reflection or reason, but when they are not, and the object of the hallucination or illusion is believed to have a real positive existence, the patient is said to labor under a *delusion*. In the former—when the error is detected—he is sane; in the latter, insane. Insensibility to change in temperature is a characteristic of mania; or, at least, even if they feel as susceptible to those changes, they seem to carry no warning influence, which changes bring the sane. Mania may sometimes be mistaken for *delirium*, depending on bodily disease. The external indications of the two are so much alike that many mistakes have been committed. If one be delirious merely, he is incapable of forming a criminal intent, but the law will, in some instances, hold one responsible, even though at the time the act, of which the crime is predicated, was committed the actor was in delirium. This condition closely resembles the acute form of mania; the difference being that a disordered state of the mind is the first symptom of mania, while delirium is the result of bodily disease, and is attended with greater febrile excitement than in mania. Delirium, then, is not of itself a disease, but the symptoms or results thereof and passes away with it. Its disappearance is sudden, leaving the mind clear; while mania, depending upon other causes is more persistent and yields supremacy slowly: Hawthorn's Med. Jour.

*Monomania* is the term applied to that form of insanity in which the mental alienation is partial; the delusion being confined to one subject or one class of subjects, as *pyromania*, *kleptomania*, *dipsomania*, and many others. This type of alienation varies much more in degree than mania, it being frequently the case that the abnormal impulse may be overcome so far that the actions of the patient can be governed by his will. It does not always deprive one of the power to perform his ordinary social duties, and, in fine, develops no very marked change in the manner, social life or business habits, except upon the subject of the insanity, or subjects which lead immediately to and are closely allied therewith. But yet we are not to infer from this that the mind is sound as to all subjects other than the one upon which the insanity exists. The whole mind is to some extent unsound, but the characteristic of this branch of insanity is that the delusion exists only as to one subject or class of subjects. The manifestation is principally toward some particular per-

son or object: (Prichard). There can be no doubt that all the other mental faculties are more or less affected, but may that not be sympathetic merely? The better theory seems to be that such is the case; that the general unsoundness is more the result of a physical juxtaposition, either local or organic, with the part primarily diseased. Mania and eccentricity may be confounded, but this difference always exists: In mania there is a change of the mental character; in eccentricity the peculiarity has always been observed; his mental character is not changed, but the same. A monomaniac can never be convinced that his ideas and acts are at variance with society and the axioms of social intercourse. He thinks his conduct, however absurd and ridiculous, wise and consistent with the results of reason. Together with this, the controlling power of the will is lost. An eccentric person may be convinced that he is in error, that his ideas are absurd, but he holds to them that he may set society at defiance. Eccentric habits suddenly acquired are, however, evidences of insanity.

Some medico-legal writers recognize what is known as *moral insanity*; that is, an insanity independent of the intellect, and which, though it may affect the mind as a result, looks for its primary cause not to a derangement of the mind. The derangement of the mind seems to carry with it as a result a certain derangement of the morals; but a derangement of the morals may exist without dethroning the mind of its power to discriminate rationally. Until lately the Courts looked without favor and with an air of intolerance upon the plea of *moral insanity*, unless accompanied by some intellectual aberration. But to-day the defense of *emotional insanity* seems to be fixing itself firmly into our medical jurisprudence. The distinction yet prevails in civil cases, and justly too; for neither the science nor our system of laws are sufficiently developed to deal with this question with success in civil actions. In the fulness of time, when nature and social organism, in their necessity, shall call for it, it will take its place among our refinements and subtleties of the law. There is a necessity which calls for the needful in its proper time, and a nature to supply the want.

*Dementia* is that state where there is a total absence of all reasoning powers; not a perversion of them but a total destruction.

*Amentia*, or *idiocy*, is a congenital absence of mental power. *Dementia* presupposes a mental power originally existing, and then a destruction. In *amentia* there never was the mental power, even from birth. *Amentia* is the *dementia naturalis*; while *mania*, *mono-*

*mania* and *dementia* form the *dementia accidentalis*. It needs no scientific instruction to enable one to recognize the *dementia naturalis*, being marked by the want of intellectual expression, a vague look, and a malformation of the head and face. In some cases of congenital deficiency the person may be taught a few simple ideas. This state is called *imbecility*. The mind of an imbecile can never be brought to a healthy standard of intellectuality. The power of speech is defective to an extent almost of total deprivation, in the most marked cases of *amentia*, while it is better in the lighter cases of imbecility. Some writers have gone so far as to assert that the power of speech is an infallible index of *amentia*, each one reflecting its own peculiar shade. Hallucinations and illusions accompany *mania* and *monomania*, but never are present in cases of *amentia* or *dementia*. The imbecility of old age is termed *senile dementia*.

The foregoing arrangement is suggested by convenience, and will, I think, commend itself to the practitioner. For while lawyers mostly rest contented with the loose and yet sweeping expression "unsoundness of mind," and group all together under that term whose mental power, from the meager evidence at hand, appears to be alienated, yet this practice does not become scientific, as custom becomes common law. It must be remembered that evidences of insanity and imposition result from a more comprehensive research into and classification of this branch of jurisprudence. We are thereby more able to detect the impostor who seeks to hide the darkness of his deed behind the guise of insanity, cheat justice, and reap the pity and commiseration, care and protection of a humane public. We thereby discriminate between eccentricity and monomania; a task which frequently must have the aid of science to be understandingly performed. I am very sensibly aware that this division may be, and is, by the metaphysical scholars largely amplified, yet for the limits of this article I must not presume to be more extended, but refer the reader to the works where each branch is fully discussed. This amplification of division and subdivision, especially of monomania, is assuming considerable proportions. We have *kleptomania*, *pyromania*, *homicidal-monomania*, *puerperal-mania*, *dipsomania*, *erotomania*, *nympho-mania*, and many others.

As to the evidence of insanity. The whole range of human action and human fancy and thought must in time furnish its evidence of this condition. The most trivial act may trace with its slender trail irresistibly to the establishment of insanity. One of the most infallible tests is a *post mortem* examination, but this does

not suffice for the necessities of criminal law. The past private and public life of the person setting up the plea may be searched if sufficient evidence is not forthcoming by a most palpable and obvious course of action at and immediately preceding the commission of the act, and tending immediately to its establishment. Even insanity in early years may, after the lapse of a long period, be shown as a *morceau* of evidence tending to establish the plea. Further than this there is nothing better settled in medical jurisprudence than the theory of "*hereditary transmission*." Every law student will remember Chitty said this evidence was not admissible in either civil or criminal cases. He was correct, judged by the lights before him, when he wrote; but then the sciences of metaphysics, psychology and biology were not so well understood as they are in recent years; and hence warrant is given to the more modern courts, arising from a well-settled principle of law, to depart from this learned author. Such evidence was received as early as 1844. Do not mistake the doctrine. It merely allows such fact, or theory, to be received by the jury to show a physical predisposition towards the disease. It, too, is merely a *morceau* of evidence—a small fact worth but little by itself, but which may be of vast moment in the light of other facts. Scientists have reduced statistics to a proportion, showing that from one-sixth to one-half of all cases of insanity may be traced to hereditary transmission of taints and congenital malformations, which frequently produces aberration, and always renders it possible. Neither does it appear in all the generations, but is subject to *atavism*. It may pass over several generations without manifesting itself, and appear in one more remote; and when it so appears it is most frequently at the same age as in the ancestor. Also children of parents marrying late in life are more subject to the disease than of those marrying earlier.

It is generally the case that feigned insanity dates subsequent to the act whose effect it is intended to avert, but it is such a desperate game that those whose circumstances are so pressing as to drive them to that extremity, in their anxiety to play the lunatic to perfection overdo the part and divulge the truth. Mania is most usually the type in which imposition appears, for the common unlearned idea of insanity is made up of violent action and incoherent mutterings and ravings. In mania the patient sleeps but little and the ravings are equally furious both day and night; but the impostor must rest at night after his violent exertions, and sleeps as soundly as any one. The eye of a maniac, however immobile and calm the

features, displays by its frenzied expression the true state of the mind. The feigning of monomania would be a task too difficult for any to accomplish save one well skilled in acting and possessing a consummate knowledge of the science of metaphysics. Dementia is easily feigned, as it generally comes on slowly, and depends on organic changes, as old age, paralysis, apoplexy, or on account of long continued mania. As this is a total abolition of all mental power the discovery of any connected idea would dissolve the deception. Idiocy can not be feigned successfully; science and even ordinary intelligence will detect it, because it depends upon congenital deficiencies easily detected.

We will, having shown as best we could in such contracted space as it was necessary to limit this article to, in what insanity consists, treat of the responsibility of insane defendants in trials for homicide. The rule and spirit of our law is that no man is responsible like a sane person for any act committed by him while in a state of insanity. This plea, like that of self-defense, goes to the merits of all criminal charges whether misdemeanors or felonies; and what has been held on trials of other offenses is, when it goes to the intent, law in cases of homicide.

Surely when one part of the brain is diseased so as to prevent its normal functions being performed, and the other remains to some extent healthy, the ideas and impressions produced must, even in such great confusion, have some characteristic property. In whatever peculiar direction this abnormal development is most intense, or so intense as to prevent the supremacy of reason and reflection, there is the insanity. Any physical disease obstructing the free operation of the mind almost always deepens and strengthens this condition in some particular sphere or towards some particular object; all the mind is changed to some extent, yet, even in absolute mania, without at the time of its existence displaying one ray of intelligence it may pass away temporarily, leaving the mind clear and wholly free from all remembrance of events transpiring while the delusion existed, to be again overpowered by the mania returning at stated periods.

As to the test of insanity as evolved into a formula, I have only to say that the great mistake of those writers who grope through the task of making an application, is, that they deal with it as a question of *law*, when it is only a question of *fact*. As to legal tests I feel assured in saying that it is impossible to lay down one which will fill the conditions of a rule. It is safest for the Courts to lay down

rules upon the trial of each case, corresponding as well as may be with the facts of the case and the acknowledged truths of the science. Until the science has been thoroughly mastered, and mapped out like a geographer would map out a continent, so that the scientific eye can grasp it in all its proportions, it will be useless to try to lay down any formula which embodies the necessary elements of a rule.

The test of knowing good from evil, or right from wrong, though held by many Courts, I submit with respect is no test at all. "The unsoundness of mind which excuses a criminal act must be of such degree as to deprive the accused of the capacity to know right from wrong; without this it does not excuse:" Justice Peters in *Henry Beasley vs. State*, Alabama, Head Notes, January Term, 1874. He cites in that case 1 Rusler, 10, 11, and cases cited: Lord Ferris's case.

It is true that when the mental alienation is so great that it totally deprives one of the power of discriminating between right and wrong, he is not responsible criminally for an act infringing the municipal law. I submit that here no one would hesitate to pronounce it a case of *amentia*. But there are many whose minds are dull, torpid and weak, and yet fall not in any class of insanity; who can not tell the right from the wrong in many acts which the law makes criminal. Yet mere weakness of mind is no defense. What would Justice Peters do with these? They are above idiocy, yet come not up to his test of accountability. "Without this it does not excuse." Let us see. Hartshorne cites a case of a young man upon whom an inquisition was had in 1843, who was of mild manner, but labored under a delusion concerning wind-mills. He would sit and watch one for whole days at a time. His friends removed him to a place where there were no wind-mills, hoping thereby to cure him of his malady. Shortly afterwards he enticed a child into a wood and killed it in the most brutal manner, lacerating it dreadfully. He afterwards confessed that he did this act knowing that he would be shut up—imprisoned for the deed—taking the chances of being confined near to and in sight of a wind-mill. Here, in the knowledge that he would be confined, he recognized the *wrong* in the act. The case of the Englishman, Dodd, who killed his father and fled to France; who was afterwards taken, tried and acquitted on the ground of insanity, has been frequently cited by medico-legal writers. The reports of physicians and wardens of insane asylums almost unanimously agree that even those

patients suffering under the worst attacks of monomania, recognize the right from the wrong, and frequently evince the most consummate tact and cunning. Many cases are reported where defendants have before and after killing, confessed that they did it that they might be hung. Hadfield, who was tried for shooting at George III., and acquitted on the ground of insanity, furnishes another example of the presence of the knowledge of right and wrong in the perpetration of the act. In firing at the King he knew that he was violating the law, but did it because he wished some one else to put him to death—he did not wish to commit suicide. Martin, tried for setting fire to the York Cathedral, knew that it was illegal and wrong, but was under the delusion that God commanded him to do it. I might go on to multiply examples to a tedious length, but do not deem it necessary. Few will agree with Justice Peters after having looked into the books. (See Dr. Ray on Insanity.)

A complete prostration of the understanding so that it could not recognize right from wrong, in any event, would be a strong and probably conclusive proof of insanity; for outside of amentia how could such defects exist without a disease of the mind, radically changing its operation? The best idea we have been able to arrive at with reference to this plea is that, except in cases of amentia, *the tests should be in the ability of the defendant to resist the effect of the disease in its connection with the perpetration of that particular act.* Surely, if he could recognize the wrong in it, and could resist the impulse to do the act, he ought to suffer the penalty of the violated law. But though the wrong was fully seen and he was powerless to resist the impulse given him by the disease, surely then humanity nor law should hold him subject to the extreme penalty. The law recognizes, in some cases, a defense of duress and threats used to force the commission of the crime. Why then should not he who acts, being driven thereto by an impulse which, though he knows to be wrong, he is powerless to resist, be dealt with differently from him who acts with no impulse save that of his own malicious will? Justice Peters does not recognize this irresistible impulse, and seems to anchor, without exception or reservation, to the theory of free moral agency. This impulse is easily understood in the light of metaphysics and biology. The mind is the motive power of the machine called man; it directs his action in every minute respect. Like the steam in an engine, it starts and stops it, gauges the rate and gives tone to the motion. Even in our everyday social and business relations we see this demonstrated. The walk, the wave

of the hand, the flutter of the tongue, the roll of the eye, and, in fine, every act bespeaks the tone of the motive power within. The wave of Cæsar's hand would attract the Roman Senate, but the same motion made by a man of weak intellect would never have had that effect. So far then as life—action—is concerned, we are the creatures of the impulses of the mind, self-directing and independent, save of its own imperfections. So long as it is sound it has the elements of free moral agency, and hence is responsible. But when diseased its machine is crazed, just as the breaking out of a tooth in an important wheel deranges the play of the whole machine. It looses immediately that characteristic power of self-control, and drives the man on like an unmanned ship before the pitiless storms—hopeless and powerless.

We seriously doubt whether in all the ranks of the judiciary in America and England a score could be found who would agree with Justice Peters in ignoring the theory of *irresistible insane impulses*, and not one of eminence.

In attempting to lay down a legal rule as a test to be given to the jury, the greatest difficulty has always been experienced, because, even if sufficiently large in its terms to prevent misconstruction, it has to deal with a question of fact rather than of law. The question is insanity, *vel non*, which is a question of fact, ascertained by the combined means of certain legal rules and scientific truths, together with the evidence. If one be afflicted with kleptomania, and his aberration is not proven to extend further, he can not defend with that against a charge of murder, unless he shows that the murder was the result of an impulse originating with the diseased part and over which he had no power of control. True, there is some doubt among scientists about whether any sound mental product can come from a mind afflicted with insanity in part, as by a monomania, but can this doubt be such as to fall within that class of reasonable doubts, of which the defendant must receive the benefit? The law books will not permit it to be so used, but I think it no rashness to expect this doubt to be so classed, going for what it is worth, in the course of time and development. It is in the track of expansive modern philosophy. This test is in one sense, only, a law—it is a law of nature.

The celebrated Dr. Ray, in his work on Insanity, declares as his final conclusion that no absolutely true test can be given. And farther, he says, "to persons practically acquainted with the insane mind, it is well known that in every hospital for the insane, are patients

capable of distinguishing between right and wrong, knowing well enough how to appreciate the nature and legal consequences of their acts, acknowledging the sanctions of religion, and never acting from irresistible impulse, but deliberately and shrewdly:" Ray's Medical Jurisprudence, 43. No mere lawyer is competent of dealing successfully with this question, but a deep and thorough investigation of metaphysics is absolutely necessary to grasp its mysteries with anything like comprehension. Years of study is necessary to master it, and therefore Dr. Ray's words are entitled to more weight upon a subject which he studied for years, than that of Justice Peters, who has devoted his life to law. Dr. Ray is recommended by his qualifications and years of hard study, while the other gentleman has spent most of his life in paying devotion to another, yet equally honorable, profession. We offer this in the light of *evidence*, and this is a question of fact. But it seems that few, if any, of the law writers have been so hardy as to advocate Dr. Ray's conclusion as a rule in law, nor may they hereafter; yet, I must say, until it is so recognized, the law will be neither as just nor humane as other sciences.

A cogent reason prevails why the recognition should be made, and that is, that the easiest road to the proof of insanity is through scientists. This latter class of professionals deal with the law of human society—that law which society, by making necessary, created, but with a law which antedates the formation of society. They pay their devotion to the law of nature. All fair minded men will then readily recognize the folly of the mere lawyer in persistently disregarding the truth of a science with which he must deal. The rule *stare decisis*, though grounded in unquestioned wisdom, must not be carried to such inordinate lengths as to defeat that wisdom which called it into recognition. Since insanity is a *fact*, we must look to the science of metaphysics (if it can be called a science), and not to the law books alone for a clear knowledge of it. It is to be hoped that ere long the Courts will march up to the truths of this great study; great because it strikes at attributes the most godlike.

The Courts of New York have been usually in advance of the other States in adopting the facts of science, and incorporating them into the law by application, and have gone to great lengths to meet this great question of insanity, at a point where the law could harmonize with our knowledge of the *facts*, but we find still a strong tendency to cling to the ideas of the past: See McFarland's case,

*Flanagan vs. The People*, 52 N. Y., 467, where they adhere to the decision of *Freeman vs. The People*, 4 Denio., 28, and McNaughlen's case, 10 Clark and Fin., 210. A very able opinion will be found in 50 N. H., 369, (*State vs. Jones*), rendered by Justice Ladd. The inevitable tendency of this case will be to uproot such decisions as *Freeman vs. State*, *supra*, for, besides being clear and well digested, it has something more than they that gives it stability, the sanction of science. It is not too much to predict, and surely is worthy of hope, that the spirit found in this decision will revolutionize the law of insanity, and bring the Courts up to the high standard it displays. Sooner or later it must be so.

There is a phase of insanity which, on account of its prevalence, needs more than a general notice. I refer to *Dipsomania*. Drunkenness is a status so nearly approaching insanity that great difficulty often arises (or would arise upon a proper investigation) in determining where simple drunkenness ceases, and insanity, resulting from intoxication begins. Simple drunkenness is no excuse for crime, and can not be given in evidence to justify the act or mitigate the punishment, except in cases where the *gravamen* of the offense is a *specific*, as contradistinguished from a *general*, *intent*. One may be so intoxicated as to be incapable of forming the specific intent to murder a certain person, and yet not be insane: *Odletree vs. State*, 28 Ala., 693.

In all cases where the *gravamen* is the specific intent, drunkenness sufficient to deprive the offender of the mental power to form such intent is a defense; but when the intent may be general the intoxication is no defense, but the insanity resulting therefrom is.

A Court being a place where the municipal law, only, is decided, I am at a loss to see the authority Justice Peters had in view when he said "drunkenness itself is an offense:" *Henry Beasley vs. The State*, *supra*. I am well aware that Blackstone, and, perhaps others, held this doctrine, but yet I have never seen the law inflicting a penalty for it in Alabama. So far as our criminal law is concerned, drunkenness *per se* is no offense. It is an infringement of the moral code, it is a pure question of morals, and whatever it may have been in olden times is not the law to-day. Why not law to-day? Simply because the *spirit* of the times and the genius of our institutions will not tolerate such puritanical notions. I do not say that it is "puritanic" to keep sober, nor would I protect intoxication, but I would condemn the law that prohibited it as

weak, futile and visionary, and I would have judges to enunciate the law which they are placed upon the bench to expound, and not that law which they have no more right to decide than the man upon whose case they are passing. In other words, I would not have the bench to become a legislature on morals.

"No degree of mere intoxication voluntarily produced is a palliation or excuse for a criminal act committed in a fit of drunkenness."

"On trials for murder in such a case, a proper charge would be if the defendant was merely drunk and not insane, when he committed the criminal act, then he was guilty," etc.: *Henry Beasley vs. State, supra*. To this extent the authorities sustain the above case: 13 Ala., 413.

"The voluntary drunkenness of a murderer neither excuses the crime nor mitigates the punishment. The rule is, that one in a state of voluntary intoxication is subject to the same rules and principles of law that a sane man is, and that where a provocation is offered, and the one offering it is killed, if it mitigates the offense of the man drunk, it should also mitigate the offense of the man sober:" *Shannaton vs. Commonwealth*, 8 American Reports, 465; 33 Ala., 419; 3 Parker's Criminal Reports, 632; *Morris vs. State*, 25 Ala., 57.

Drunkenness may have a very material effect upon the appearance or non-appearance of malice from the evidence in a given case; for it is possible for one to be too drunk to form any rational sentiment and yet be able to do great violence. This doctrine flows as corollary from that laid down in *Ogletree vs. State, supra*, and whether this state, *vel non*, exists, is a fact for the jury: *Reg vs. Cruse*, 86 and page 567, Law Times, Sept. 27, 1845.

Drunkenness voluntarily produced will not excuse the defendant, but *mania-a-potu*, or *delirium tremens*, though the effect of drink, will be good as a plea. The drinking predisposes the person while most usually its absence is the direct cause of the delirium. The plea is good, not because the pleader was drunk, but because he was insane: *United States vs. Drew*, 5 Mass., 28; *United States vs. McGlen*, 1 C. C. Ct., 1; *United States vs. Clark*, 2 Cranch. C. Ct., 158.

A great deal of trouble and difficult work will be necessarily required when this principle is involved in practice, to find the line separating the sane, but drunk man, from the insane. This task is wisely left with the jury who are generally taken from that class of citizens who are the best judges of fact in the land. Sober, staid,

benevolent and intelligent men who know their duty, are interested in the disposition of the cause, and the maintainance of law, and who don't hesitate to perform it.

Upon whom, under the plea of insanity, does the *onus probandi* rest, and if upon the defendant, how strong must his evidence be to acquit when this is his only plea?

It is a maxim of the law that every man is presumed sane until the contrary is shown. The burden of proof of insanity to overcome such presumption rests upon the accused: *Lake vs. The People*, 1 Park. Crim. Rep., 495.

It seems that this opinion was delivered under the idea that this defense was in the nature of a confession and avoidance; a confession of the perpetration of the *act*, but an avoidance of the punishment by showing an absence of the *intent*. Shifting the *onus* to the defendant, is not a favorite with the law books, and whenever it has been so held, it owed its existence to necessity. In the case of *The Josepha Segunda*, 5 Wheaton's Rep., 338, Mr. Justice Livingston used the following language:

"When an act is done, which of itself, and unexplained, is a violation of law, and a party to extricate himself, or his property, from the consequences of it, resorts to the plea of necessity or distress, the burden of proof is not only thrown upon him, but when the temptation to infringe the law is great, and the alleged necessity, if real, can be fully and easily established, no Court should be satisfied with anything short of the most convincing and conclusive testimony." The same doctrine is held in *The Struggle vs. The United States*, 9 Cranch, 71. In that case, it was held to be necessary to prove the specific matter beyond all reasonable doubt: See *James Wells vs. United States*, 7 Cranch, 22.

The unsoundness of mind must be established by evidence satisfactory to the jury: 3 Green. on Ev., § 5; 2 *Ib.*, § 372-3. In the case of *Ogletree vs. State*, *supra*, the Court held that the establishment of a *prima facie* case merely, does not take away from the defendant the presumption of innocence, but leaves it to operate in connection with, or in aid of, any proof offered by him to rebut or impair the *prima facie* case thus made out by the State. A *prima facie* case being sufficient to convict in the absence of any other evidence, must be so strong as to exclude all reasonable doubt. It is difficult to see how the presumption of innocence can exist when every reasonable doubt has been overcome by the evidence. If this case is correct, it does not devolve upon the defendant, under

the plea of insanity, to prove it conclusively, but only to the satisfaction of the jury. This seems to be the correct rule, or, at least, it has the sanction of seemingly good reasons. I am not aware of any case in Alabama where the question has been decided in point.

How insanity is proven is a question upon which there is some contrariety among the cases. It was held in New Hampshire in the case of *Boardman vs. Woodman*, 47 N. H., 120, and in *State vs. Pike*, 49 N. H., 399, that witnesses not experts can not be heard to give their *opinions* on the question of insanity. The acts of the accused, his declarations, conversations, habits and personal appearance, and, in fine, all the external *indicia* of an abnormal condition can be proven as other facts by nonprofessionals, and from which the jury can draw their conclusion. This is not questioned, the only contest being as to the introduction of the mere *opinions* of nonprofessionals. The authorities are collected in the dissenting opinion of Judge Doe in the case of *State vs. Pike, supra*. The law in Alabama is settled in *in re Carmichael*, 36 Ala., 515, the same question having been before the Court in the cases of *State vs. Brinyea*, 5 Ala., 241; *Bowling vs. Bowling*, 8 Ala., 538; *Roberts vs. Trawick*, 13 Ala., 68; *Florey vs. Florey*, 24 Ala., 241; *Powell vs. State*, 25 Ala., 21; *Stubbs vs. Houston*, 33 Ala., 555. From these cases the following seems to be the rule: A nonprofessional witness can not give his *opinion* on the question of insanity, *vel non*, except in connection with the facts on which it is based, that particular acts and conduct of the person whose insanity is in issue are competent evidence to go to the jury, and that to justify the opinion of such witness, it must appear that he occupied a position towards the person alleged to be insane which enabled him to form a correct judgment as to his mental condition. Further, it is held that an occasional interview on general subjects, or mere passing acquaintance, will not legalize the opinions of nonprofessional witnesses. The acquaintance must be intimate.

Extracts from standard medical books are competent evidence and may be read to the jury: *Merkle vs. State*, 37 Ala., 139; *Staudenmier vs. Williamson*, 29 Ala., 559.

On questions of science—as insanity—persons of skill may speak not only as to facts, but are allowed to give their opinions in evidence: *Washington vs. Cole*, 6 Ala., 212. But the Court should first ascertain if he be an expert: *Tallis vs. Kidd*, 12 Ala., 646.

In concluding this article, it is well that something should be said

concerning the plea of insanity in connection with its reception by the public. Hitherto we have dealt with the *lex scripta*, and now propose, briefly, to notice the character of the workshop wherein all laws are conceived. Popular will gives shape to the laws, creates the power that puts them in form, and sends them upon their mission of social ruin or utility, and, finally, when unpopular, it strikes them from the statute books, and labels the author a political fungus. This popular sentiment is not always a wise or a just power; it sometimes brings to life, in the hour of hate and passion, a creature which falls far short of attaining the desired object, and sometimes works the grossest injustice. Were the results perfect, man himself would be infallible.

No man in the full possession of an ordinary amount of reason will deny the fact that insanity exists; that it is one of the unfortunate conditions to which his fellow-men are frequently subjected. If it is a fact; if it is that monumental truth which scientists claim it to be, the public should see to it that it be duly and fully protected.

Yet we see a growing tendency with the press to cover it with contempt, and drive it from the body of the law. It is to-day lamentably popular to declare with unseemly haste that the poor accursed lunatic is a guilty scoundrel seeking to hide his head beneath the protecting shield of the "insanity dodge;" when it is not only his right absolutely to make the plea, but it is the command of the law, both municipal and moral, upon all men to respect it. The great evil with the press of to-day is a disposition to prejudge, to jump at conclusions concerning things about which it is frequently uninformed. The *per centum* of ordinary editors who are ignorant of the sciences, both of law and metaphysics, is very large, yet, not unfrequently, the *per centum* of those who recognize that truth and hesitate and refrain from prejudging is very small. One who has not spent some of his days in the patient investigation of these sciences as blended in the works of medico legal writers, will find upon inquiry, that most of his prior ideas and theories were the vainest castles in the air. It will not be presumption to say that many editors could not give a clear idea of the obvious divisions or characteristics of insanity, or of the law applicable thereto. It takes experience and study to master either, much less their combined intricacies; and it would be more the part of wisdom, to say nothing of justice, for those persons to cease their cry against this plea for a season, and seat themselves at the feet of those old masters

whose knowledge and wisdom has taken from them their early, hasty, undigested and untenable assumptions, and learn that they know nothing of the science whose spokesmen they fain would be. Let them learn before they would teach,

The press is a power in the land, whose results, judged as a whole, are pregnant with the fruits of progress, religion and truth; but they are subject to the inevitable destiny of things fallible. It is not the province of the press to meddle with the affairs of the Courts, except that the acts of the latter are open to comment by the former; but when it raises a cry which tends to impede the due execution of the law, or prevent the administration of justice, it goes far beyond the sphere to which it rightly belongs. When the celebrated case of *McFarland* was pending in the New York courts, the press generally was raising a hue and cry of, down with *McFarland* and his "insanity dodge," and seeking to drive the plea out of Court. But, thanks to the integrity of our judiciary, the ridicule was wasted and the majesty of the law maintained. If the Courts would maintain their purity they must be free from public opinion; that is, they must be free from the interference of all the tides of ephemeral sensations, and untrammelled in administering the law as it is written. If the law is wrong, the judiciary is yet bound to maintain it. Nothing can be more reprehensible in these days of "departures," "sensations," and "tendencies," than any effort whose results would be to trammel the judiciary. The judiciary is the bulwark of republican liberty. England sets us a good example in the case of *Regina vs. Onslow*, 5 Moak's English Reports. This case furnishes us a good criterion for the ascertainment of that measure of respect that the public should have for the province of the Courts. It is gratifying to the lovers of a healthy stability to see grand results as they flow from the labors of true journalism, enlightening the public, giving free access to the thoughts of a world, bringing the flint of California in contact with the steel of the Atlantic States, with its thousands of attendant flashes of intellect; the whole foreshadowing a wiser and better future. But all journalists should, and will when a higher type of enlightenment is attained, see that for the Courts to do their work well, they should not be subjected to improper influences. In their recklessness they prejudge the cause, and should the tide flow in favor of a criminal, though it be set in motion in gross ignorance of the facts, strong indeed must be the jury to fly in the face of popular opinion with their verdict, though it has the sanction of eternal and venerated

justice. On the contrary, when the gales of an unthinking prejudice are against the accused, the jury goes into the box with biases which they may not recognize, but which may weigh like mountains upon the cause. The difficulty of obtaining a jury in New York city in important murder cases, comes home with crushing weight to condemn these ill-timed and sensational articles, which rob a man of the inalienable constitutional right of being tried by a fair and impartial jury of his peers. Immediately after the acquittal of Daniel McFarland, it would have been quite a task to prove insanity to the satisfaction of a New York jury in a case of general importance. "And these were the fruits of that tree."

If the plea of insanity is a part of our great system of law, it is worthy of a careful and decorous regard. If it is a part of that polity which puts down the wrong and upholds the right, it is worthy of the most sacred protection, and of being diligently and faithfully tested. An indecent haste will not satisfy the calls of duty which should ever be fresh in an official's ear. "Whatever is worth doing at all is worth doing well."

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## *Railroad Laws, or Legislative Control of Railroads.*

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The writer of the following essay enters upon the subject with some degree of diffidence, inasmuch as it is one of those subjects which, while it is of a popular character, is, nevertheless, one of considerable difficulty. What are the powers of the State as to the control of corporations? How far does the power extend, and by what is it modified? These questions which, viewed in the light of the legislation of some of the States of the Union, in regard to railroad abuses, are of vast importance to by far the greater portion of the people of the States. That there are abuses of power and of corporate franchises, in reference to the railroads of the country, must be admitted, if the legislation referred to means anything. But how and by exactly what method these abuses are to be rectified are questions of deep interest.. The purpose of this essay is, if possible, to throw some additional light on the question of legislative control over corporations, and especially railroads. But, in order to understand the question fully, or even approximately, it may be necessary to advert to the object of civil government. To discuss, also, the inherent powers of the States, especially the power of public police. To discuss the *modifying* points, as they spring from the Constitution of the United States, and therein of the obligation of contracts. To discuss the limitations arising from the State Constitutions. These are the great landmarks of *reason*, of *legislation*, and of *adjudication*, which must be our guide in the discussion of this interesting subject, and if there be any other distinctions, they are included in one or the other of these. We shall consider these in one general view, as they necessarily arise in relation to the main subject.

What is the object of civil society, as represented by the legislature? Is it to form laws for the great mass of the people constituting the body politic, or is it to establish laws which shall place a few favored persons in positions to thrive upon, and make gain of the necessities of the people? The object of the legislature, and of civil government, we assert to be the protection of the general good and the prosperity, peace and happiness of the greatest number; as against the few, when that law respects the rights of the few, according to those principles of justice and right, characterized by:

the comprehensive term of equity. In this view of the law and of civil society, the legal maxim, "*salus populi, suprema lex*," finds its true illustration. Any other theory of government must, from the nature of the case, be false in principle and false to the interest of the people in whom, according to the theory of American politics, the supreme sovereignty resides. We assume, therefore, as a matter of *reason*, that there is inherent in the people, represented in their State Legislatures, sufficient power and authority to control any and all corporations subject to the jurisdiction of their laws. Especially is this the case, when such regulative legislation looks to the correction of abuses of such corporate franchises as exist by authority of laws of the State. The presumption of railroads as corporations, that they are, in important respects, beyond the reach of the legislature, would prove that the States can divest themselves of sovereignty, a proposition which, if the corporations be correct, would reduce government to an absurdity, and would tend to establish the doctrine that the creature is superior to the creator—a proposition as illogical as it is absurd. The legislature could not, if it were to try, under our theory of government, divest the people of their sovereign rights, neither could it do that which a subsequent legislature would not have a right to undo, if it impaired the sovereignty, or rights of the sovereign people. These corporations claim to have vested rights, and that an act of the legislature, looking to their control, is an infringement of those rights, and tends to impair the obligation of contracts. This may be true to a certain extent, but beyond that point we assert the right of the legislature to control any and every corporation subject to its jurisdiction, or within the borders of the State. When we consider the object of civil government, and with this the objects had in view by the State in granting corporate franchises to a corporation, it is easy to discover, as a matter of reason, that if a corporation should violate the object of its institution or incorporation, by flagrant acts, prejudicial to the public welfare, and thus become a violator of *common right*, that the same power which created would have the inherent right to correct the abuse, by making such provision by statute as would remedy the evil, if no other sufficient remedy existed. To countenance the theory that the State can not correct abuses of *corporate franchises*, is equivalent to supposing that corporations are formed for the express purpose of being beyond the reach of the law. Suppose a railroad under its right of taking tolls or fares for the carriage of either passengers or freights, should levy such

exorbitant rates as to tend to the stagnation of business and travel, and to the crippling of the general prosperity of the State. Can it be conceived that the legislature have not the power to regulate tolls and fares to such an extent at least as to work for the general good of the people? If it were otherwise, the corporations of the country might stop trade and travel, *might thus dictate* and control legislation, and make it a ruinous business to producer and consumer alike. But suppose they do not levy prohibitive tolls and fares, but such, however, as are totally disproportionate to the benefits they confer, and thus tend to stop the general thrift of the people, are we to conclude that there is no remedy, and that the evil must be borne, and *ultimate ruin* to the country ensue? No, the power is found in the legislature to correct these abuses and those of like character. For what are legislatures established but to correct wrongs, protect rights? And have these corporations such a vested right in their corporate franchises as to be beyond the reach of law, and thus have license to rob and plunder the masses, and under the name of law to sap the foundations of the State's and Nation's prosperity and peace? Are we driven to the conclusion that because the *vested rights* of corporations are protected by law, that they are, therefore, placed beyond the reach of the *inherent power of the State*, whose creatures they are?

The States, under our system of government, are said to be sovereign—to have *sovereign rights resting* in the *people*, and this is true, except as they have parted with their sovereignty as evinced by the Constitution of the United States, or by their own State Constitutions. To arrive at the gist of the controversy as between the States and these corporations, it becomes necessary to investigate the Constitution of the United States in order to determine the question as to whether the people of the States have really parted with their sovereignty or right to legislate for the good of the people, and, also, to see what restrictions they have placed upon themselves in their own State Constitutions. An impartial investigation of the *grants of power* to the general government, and the restrictions placed upon the States in the Constitution of the United States and of their own States, will disclose the true *status* of the question of State or legislative control of railroads. We lay it down as a proposition too plain to be seriously controverted, that all power is of the people—that the ultimate attribute of sovereignty rests in the people, and that, therefore, like the British Parliament, the legislators of the people are sovereign, and of right must determine for them-

selves, in their own way, what shall and what shall not be law ; that there is no power higher or beyond the people, as expressed in the legislative will, when it takes the form of a statute ; that this power is supreme, and like the British Parliament, *omnipotent*, except as modified by the Constitution of the States, or of the United States.

If, therefore, on an investigation of the restrictions placed upon themselves by the people in their National Constitution or State Constitutions, we shall fail to discover anything placing it beyond the power of the States to legislate upon the control or regulation of railroads in their several jurisdictions, we must conclude that there is the power so to control these corporations as to force them *so to use their own as not to impair the rights of others*. It is not our purpose to go into an elaborate examination of the several State Constitutions in order to arrive at our conclusions, but simply, upon general principles, to point out wherein the power exists, and the method of its legitimate exercise by the State. We believe we have stated fairly the question of sovereignty, and where it rests, but we will cite a few authorities upon the point, so as to place it, if possible, upon still stronger grounds. We have also stated, we think fairly, the object of civil government, and placed that, we think, in a fair and intelligent light. If, therefore, we are correct in the positions we have assumed as to the object of civil government, and as to where the legitimate sovereignty resides, and the authorities to be cited shall sustain us in our views, we think the position for which we contend will be easily established, subject only to the restrictions contained in the State or Federal Constitutions. "Sovereignty, as applied to a State, imports the supreme, absolute, uncontrollable power by which any State is governed:" Cooley's Constitutional Limitations, page 1 ; see Story on Constitution, paragraph 207 ; 1 Blackstone, 49 ; Wheaton's International Law, pt. 1, c. 2 ; Chipman on Government, 137 ; Halleck's Int. Law, 63-4. Now, according to the theory of our government, the ultimate sovereignty of the State is in and of the people, from whom springs all legitimate authority: McLean, J., in *Spooner vs McConnell*, 1 McLean, 347, and Cooley's Con. Lim., page 28. The people have created a National and State Constitutions, and conferred upon these powers of sovereignty over *certain subjects*, each being *limited* to the subjects for which it was instituted, the people retaining for purposes of government and *protection* the powers *inherent* in them as the source of sovereign power. Although the people may be said to have delegated the exclusive, sovereign powers to the several

departments of government instituted by them, they *have not* thereby divested themselves of sovereignty, but either directly or indirectly they have complete control of the government, and the several departments of government are subject to be controlled, *directed* or abolished by them according to the limitations contained in their several State and Federal Constitutions: Cooley, Constitutional Lim., 598. The Constitution, in conferring the legislative authority, has prescribed to its exercise any *limitations which the people saw fit to impose, and no other power can superadd* other limitations: Cooley's Lim., 125. In *People vs. Draper*, 15 N. Y., 543, Denio, J., says: "The people, in forming the Constitution, committed to the Legislature the *whole law-making power of the State*, which they did not *expressly or impliedly withhold*. *Plenary power* in the *legislature* for all purposes of *civil government* is the rule. A prohibition to exercise a *particular power* is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is *forbidden*. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument." And, in conclusion, the learned Judge says, "but independently of those restraints, express or implied, every subject within the *scope of civil government* is liable to be dealt with by the legislature." There are, says Cooley, two fundamental rules by which we may measure the extent of legislative authority of the States:

1. In creating a legislative department and conferring upon it the legislative powers, the people must be understood to have conferred the *full and complete* power, as it rests *in*, and may be exercised *by*, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a *special agency* for the exercise of *specifically* defined legislative powers, but is entrusted with the *general authority* to make laws *at discretion*: Cooley's C. L., page 87.

2. But the apportionment to this department of legislative power does not sanction the exercise of *executive or judicial functions*, except in those cases warranted by parliamentary usage, where they are *incidental, necessary or proper*, to the exercise of legislative authority, or where the Constitution itself, in specified cases, may expressly permit it: *Ibid*, page 87. And see further on this point,

*Thorpe vs. Rutland and Burlington Railroad Co.*, 27 Vt., 142, and 19 N. Y., 445; 20 Wend., 365; 21 Wend., 563; 5 Mich., 251; 4 Scam., 134; 27 Barb., 593; 4 Hill, 144. It appears from these authorities, that if the question of *control* or *regulation* of corporations is not by *implication* or by express inhibition of the Constitution of the State or Federal Government, excluded from the *inherent powers* of the State, that the right to control a railroad corporation is a power *still resting* in the *sovereignty* of the State as a *power of its prerogative*. To each State Constitution, therefore, subject to the provisions of the Federal Constitution, the inquirer must go in order to determine the extent of legislative power of control or regulation. As we are not, in this inquiry, to discuss the power of the judiciary under existing laws or constitutional provisions, we are, therefore, restricted to the *one question* of control or regulation by legislative authority upon general principles. Sedgewick on St., in Con. Law, page 425, says, "That in case where no power is reserved by the Legislature (power to alter, suspend or repeal charters of corporations), the true doctrine is that no radical change or alteration can be made or allowed in the charter of incorporation by which *new* and additional objects are to be accomplished, or new responsibilities incurred, without their assent," and cites 5 Hill, 384; 8 Mass. R., 268.

This would seem to be in favor of the view taken by some, that corporations have a vested right in any and all *advantages* they may obtain by omissions on the part of the Legislature. But is this true? Can the Legislature, by a mere *omission* on its part, which we will suppose it to make, so bind up legislation as to disable it or its successor from correcting abuses of corporate franchises? We incline to the opinion that a failure on the part of the Legislature to insert conditions into the charters restraining the abuses, or the right to restrain by proper legislation, *amount* to a failure to *exhaust* the *power* of the Legislature on the particular subject omitted, and that it may, by an exercise of its *inherent sovereignty*, if not restricted by some Constitutional provision, put forth its *mighty arm* and arrest, by timely legislation, abuses, because of its *right* and duty to legislate for the good of the whole people, and because it is competent in the Legislature to pass laws regulating and controlling the rights of individuals, so that in the use and enjoyment of their own they shall not injure that of others. The Legislature could not, if it were to try, divest itself of the right and duty to pass laws for the public good. If, therefore, in the judgment of the

law-making department of the government, the public good will be subserved by statutes regulating or controlling corporations, when such regulation will not conflict with the Constitutions of the Federal Government or of the State Constitutions, such regulations must be sustained by the Courts as the law of the land. Cooley's Con. Lim., pages 128-129, sustains this view, *Ibid* 168, and foot notes 1, 2, 3 and 4, and some on pages 172-173. "The power of the Legislature to impose new burdens, restrictions or limitations upon existing corporations is one of some difficulty:" Redfield, Law of R. R., vol. 2, page 428. Again he says, "There are confessedly certain essential franchises of such corporations which are not subject to legislative control, and, at the same time, it can not be doubted that these artificial beings or persons, the creatures of the law, are equally subject to legislative control, and, in the same particulars, precisely, as natural persons. These creatures of the law, therefore, stand upon no higher ground than that occupied by common or natural persons. By the rights of natural persons, therefore, so far as legislative control or regulation of conduct is concerned, we might measure the power of the Legislature as to the rights and privileges of railroads in their charters. Although a charter granted to a corporation by a State is a *contract*, the obligation of which can not be impaired by subsequent legislation, corporations, like natural persons, are subject to remedial legislation, and amenable to general laws: 45 Me., 507.

Now we assume that if the charter, being in contemplation of the law a contract, not subject to be impaired because of the provisions in the Federal Constitution, be silent upon any given point, no matter what, and no necessary implication of law implying the intention on the part of the Legislature to part with or confer the power or franchise claimed by such corporation, that no Court can make a contract for or between the parties; for it is beyond the reach of judicial power to legislate, and such making of a contract by the Court would be legislation by the Court, which it has no right to make. Courts can no more legislate contracts than Legislatures can impair their obligation. Now, in this view of the question, let us suppose the Legislature to grant a charter of incorporation to a railroad. It follows, as a matter of course, that the Legislature, if it fail to fix the rates of toll or fares for freights or passengers, that inasmuch as it is to be presumed that the formation of the corporation was for profit to the individual corporators, that they have, by necessity, an implied right to take tolls and fares for

freights or passengers; but is it to be presumed that the Legislature intended to grant such corporation the right to fix such exorbitant fares as to impose upon the public and cripple the general thrift? The maxim, *sic utere tuo ut alienum non ledas*, has here, we think, peculiar force. But the Legislature meant more in granting the corporation franchises in its charter, than that the individual members might make a profit of the capital invested in such corporation. There are always two controlling considerations in the granting, by the State, of corporate franchises, and of the acceptance of such franchises by the corporators. First, the public good and benefit is to be considered the leading and controlling motive with the Legislature, for the public good is what Legislatures are instituted for by the people. This proposition is so clear that we think it self-evident, and needing no proofs further than its naked statement. The other, we have before stated to be the benefit of the individuals composing such corporation. Now, we further assert as a self-evident fact, that the Legislature could not, if it would, do anything, or pass any act, which would divest it of its right and duty to protect, by timely legislation, the good of the people of the State at large, as against any particular class or set of individuals. Its inherent sovereignty can not be frittered away to such an extent as to disable the Legislature to act for the general benefit of the whole people. Now, if in the case supposed, the Legislature should have failed to fix the tolls or fares, and such corporations, acting under the impression that the individual benefit of the corporators was alone to be sought, should fix such rates as totally to overstep the proportion of benefit conferred in price charged, would not such corporation violate one of the objects of its incorporation? Would it not violate the leading object of its incorporation? The public good, which must, from the very nature of the powers and duties of the Legislature in granting the corporation the charter, be the leading object. But here we are met by the objection that what is to be considered a fair charge for tolls and fares is to be governed by the circumstances in each case. We are further met by the objection that the corporators ought to be the best judges of what is a fair charge, inasmuch as they are best posted as to the costs and expenses of running and equipping the roads. But who is to determine? Clearly that class of men who have authority to determine, and whose duty compels them, in the public interest, to determine. These difficulties would appear at first blush almost insurmountable. What shall the corporation take as tolls and fares,

and what is a fair charge, and at what point shall the Legislature interfere, if it have the right to interfere at all, are questions of great interest and of much nicety. Where too, if the Legislature interfere, will it cross the line of its legitimate authority, admitting that authority to exist? Difficult and puzzling as these questions appear, we think they are susceptible of a rational and a legal solution. When we remember that the public good and general welfare of the State is the object for which the Legislature is instituted, and that it must, in every instance, either directly or indirectly, have in view the object of its institution; and when we remember that individual interest and individual profit must bend to the public necessities, that the public good being the greater object of legislation necessarily includes the less, the benefit of individuals; when we remember also that there are certain uniform notions among men as to values and benefits for the use of money, and also that there is a general agreement amounting to a law of trade and a common consent of mankind, that there is a limit between benefits conferred and prices to be paid for such benefits, it seems to us clear, at least reasonable and just, that inasmuch as the powers of the Legislature, in aid of these general notions and agreements of mankind, is called in to settle the value of and interest for the use of money, that the Legislature, without in any way impairing the obligation of the contract might, if it did no more, apply the rule *sic utere tuo et alienum non ledas*. Besides, as the right to regulate the interest for the use of money is generally conceded, and that, too, upon these general principles, especially that there is a relative value attaching for its use, we maintain that the Legislature may, by such regulative laws as to them may seem just, and in such manner as that their action will not impair the obligation of the contract granted in the charter, grant or allow a just and reasonable amount to be charged as tolls and fares, as to them shall seem just and right. We believe that the Legislature, acting for the public and fulfilling its chief end in passing regulative laws for the good of the public, if it did not thereby destroy the benefits to the corporators, would be sustained by the Courts. For what are Legislatures instituted but to protect the public good? And what is the contract? As before stated, it is made up of two elements—the public good being the major, and the individual benefit to the corporators being the minor part of the contract contained in the charter of incorporation. Now, if the Legislature allow a good interest, to be adjusted in favor of the individuals composing such corporation, such as to them may be

just and fair, who will undertake to say that the minor part of such contract is not complied with by the State, while the Legislature has been faithful to the object of its institution in maintaining the major part of the contract. We do not believe that the railroads of the country should be forced to operate at a loss, for we readily conceive that legislation having that result would violate the obligation of the contract contained in the charter. Neither do we concede that they have a right to more than a just compensation for services rendered to the public, and when their tolls and fares amount to more than what is just and fair as a compensation for the benefits conferred, we take the ground that it is a case for the exercise of legislative discretion, and not only of discretion, but of duty. The proper basis for an adjustment of this question might be determined by a board of commissioners, whose duty it would be to discover the proper compensation which ought, in equity, to be allowed. This method might, in the opinion of some, lead to a constitutional difficulty, upon the ground that such board would have to exercise judicial functions to determine the rates. This might be true in some States, but the people have the power to amend their organic law, and this difficulty would be bridged in this way, which would be greatly preferable to the slow process of a trial in a court before a jury. This method is not free from objections, nor in the nature of things is any method free from objections. As sustaining the general views of the foregoing positions, upon general principles, we refer to the celebrated case of *Dartmouth College vs. Woodward*, 4 Wheaton, 518, in which Chief Justice Marshall says: "Certain things, it is agreed, are essential to the beneficial existence and successful operation of a corporation, such as individuality and perpetuity when the grant is unlimited, the power to sue and be sued, to have a common seal, and to contract," and in the case of a railway, to have a common stock, to construct and maintain its road, and to operate the same for the common benefit of the corporators. Certain other things are incident to the beneficial use of these franchises, necessarily implied. But there is a wide field of debatable ground outside of all these. It is conceded that the powers, expressly or by necessary implication conferred by the charter, and which are essential to the successful operation of the corporations, are inviolable. What is successful and beneficial operation, contains the gist of the controversy. Beyond that, there is as clearly implied, by the logical doctrine of excluded middle, the right of the Legislature to interfere, regulate and control. But who is to deter-

mine the matter? The Legislature, we say; and if they be restricted by jury trials, let the people change their organic law, and give the Legislature the needed power. Chief Justice Marshall says: "The great object of an incorporation is to bestow the character and proprieties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist." As to the general liability to legislative control, it places natural persons and corporations precisely upon the same grounds. And if we suppose the Legislature to have made the same grant to a natural person, which they might do (*Moore vs. Vise*, 32 Me., 343), it would scarcely be supposed that they thereby parted with any general legislative control over such person or business secured to him. In either case the privilege of operating the road and taking tolls or fares and freights is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would, no doubt, be void. But beyond that, the entire power of legislation resides in the legislature, unless such power is expressly limited in the grant to the corporation, as by exempting their property from taxation in consideration of a share of the profits, or a bonus, or the public duties assumed: *Boston, Concord & Montreal Railway vs. State*, 32 N. H. R., 215. Although the Court is discussing another point, nevertheless, and upon general principles and by parity of reasoning, sustains the views as hereinbefore advanced. And see further, cases cited by the last case referred to, all of which upon general principles, establish the position herein assumed. Chief Justice Taney, in *Charles River Bridge vs. Warren Bridge*, 11 Peters, 548, is to the point and specific. The continued existence of a government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to privileged corporations.

The conclusion of the learned judge is, that no claim in any way abridging the most unlimited exercise of the legislative power over persons, natural or artificial, can be successfully asserted, except upon the basis of an express grant in terms, or by necessary implication. The general power of the Legislature to control existing corporations is found in the general police power of the State. In *Boston, Concord & Montreal Railway vs. State*, the Court say: "The general police powers of the States, by which persons and

property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the States; of the perfect right in the Legislature to do which no question ever was, or upon general principles ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm that the right to do the same in regard to railways, should be made a serious question." To conclude, therefore, we assume it to be clear that, unless the Constitution of the United States, or of the State, expressly inhibits the passage of regulative laws, general in character as applicable to these corporations, the power is necessarily in the constitutional aspects of the case vested in the Legislatures of the several States. Below we append a list of the authorities, all of which illustrate, explain or sustain the positions assumed in this essay, and which, it is hoped, will be of service in aiding others to arrive at a proper conclusion in regard to this question :

Cooley's Constitutional Limitations; Redfield's Laws of Railways; Potter Dwarris on Constitutions; Sedgwick on Statutory and Constitutional Law; Story on Constitution; 1st Blackstone; Wheaton's International Law; 16 Wallace R., 678; *S. C. Railroad vs. Campbell*, 1 Rice; *Worcester vs. Railroad*, 3 Mich., 566; 21 Ill., 58; 2 Mich., 434; 20 Mich., 566; American Law Register, March 1870, vol. 18, page 165; 26 Pa. St., 308; Railways and the State, by Prof. Leonard Bacon, published in "New Englander," Oct. 1871; 1 Howard, 553; 6 Cranch, 87; 6 Wheaton, 597; 10 Howard, 534; 13 Howard, 90; 10 N. H., 138; 5 Cowen, 538; 7 Cowen, 606; 19 Maryland, 373; 30 Pa. St., 35; 1 Ohio St. 659; 3 Ohio St. 581; 16 Howard, 431; 8 Wallace, 442; 12 Wallace, 551; 24 Howard, 302; 3 Dallas, 386; 20 Wendell, 382; 10 Watts, 63; 6 Blackford, 299; 8 Blackford, 10; 1 Kent's Commentaries, 439; 15 Maryland, 389; 5 Howard, 583; 7 Cushing, 84; 32 Barbour, 102; 25 Ill., 142; 66 Pa. St., 168; 28 Ill., 283-289; *Ib.*, 264-269; 13 Ill., 548-550; 16 Ind., 85; 25 Barbour, 374; 45 Me., 569; 11 Mich., 55-57; 51 Ill., 277; 37 Barbour, 377; 103 Mass., 257; 16 Howard, 435; 25 Ill., 142-3; 21 Conn., 294; 6 Paige, 554; 27 Vt., 149; Greenleaf's Cruise on Real Property, vol. 2, page 67; 2 Potter, Ala., 303; 2 Dev. & Battle, N. C., 469; 20 N. Y., 131; 34 Pa. St., 380-1; 26 Pa., St. 307-8; 6 Howard, 547; 25 Wis., 196; 20 Mich., 483; 59 Pa. St., 290; 37 Cal., 577, 4 Met., 564; 7 Gray, 404; 16 Pick., 175; 23 Pick., 326. Other authorities might be cited, but these are sufficient.

S. S. WALLACE.

## DIGEST OF ENGLISH LAW REPORTS.

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### CONVERSION—*Goods sent by Mistake—Intention to appropriate the Goods.*

The plaintiffs sent to the defendant an invoice for barley, which stated that the barley was bought by the defendant of the plaintiffs through G. as broker, and also a delivery order, which made the barley deliverable to the order of the consignor or consignee. The defendant had not, in fact, ordered any barley of the plaintiffs. G. called on the defendant, who showed him the documents, and told him it was a mistake. G. said that it was so, and asked the defendant to indorse the order to him, for the purpose, as he said, of saving the expense of obtaining a fresh delivery order. The defendant indorsed the order to G., who possessed himself of the barley and disposed of it, and then absconded. On the trial of an action of trover, for the barley, the jury found that the defendant had no intention of appropriating the barley to his own use, but indorsed the order for the purpose of correcting what he believed to be an error, and returning the barley to the plaintiffs:

*Held*, that the defendant, having indorsed the order, without any occasion to do so, and without authority, was liable: *Hiort v. Bott*, vol ix., Ex. 86.

### COSTS OF TRUSTEE IN BANKRUPTCY.

If a trustee in bankruptcy makes an unsuccessful application to the Court, he will, in the absence of special circumstances, be ordered to pay the costs; and if the estate is insufficient for payment of the costs, the trustee must bear them personally: *Ex parte Angerstein. In re Angerstein*, vol. ix., L. JJ., 479.

### EXCLUSIVE POWER OF APPOINTMENT.

The doctrine of *Greville v. Browne*, 7 H. L. C., 689, viz., that a gift of legacies, followed by a gift of the residue of the real and personal estate, charges the legacies on the residuary real estate, is applicable to a gift of legacies followed by a gift of the residue of all the property of the testator, and over which the testator has a power of appointment, though the power be special and non-exclusive; and in such a case the legacies are charged on property subject to a power of appointment.

A testatrix, having power to appoint certain funds by will in favor of A., B., C., D. and E., in such parts, shares, and proportions as she might think fit, and having no other power, by her will gave legacies of £5 each to A., B. and C., and all the residue of her property, of whatever kind and wheresoever situate, and over which she had any appointment, to D. and E., and died leaving some personal estate of her own:

*Held*, that the will was a valid execution of the power: *Gainsford v. Dunn*, vol. xvii., M. R., 405.

### LIGHT AND AIR.

There is no difference in the right of an owner of land, to the ordinary easement of light, whether it is acquired by twenty years' user or by grant from the owner of the servient tenement; and if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at law.

But it is otherwise where the right to light claimed is not the ordinary easement,

but a special right created by the covenant; in which case a Court of Equity will grant an injunction without regard to the amount of damage.

Where the Court was not satisfied from the evidence whether the wall proposed to be built by the defendant would or not be a material obstruction to the plaintiffs' lights, the Court directed a temporary screen to be erected to the height of the proposed wall, and appointed a surveyor to report on the effect: *Leech v. Schweder*, vol. ix., L. JJ., 463.

#### REPUGNANT GIFT.

Testator gave all his real and personal estate to trustees upon trust, after paying his debts, to pay the residue of his personal estate to his wife, for her own absolute use and benefit, and the rents and annual income of his real and leasehold estates, to her during her life; and, after making provision for certain legatees and annuitants, he gave his freehold estate, after the death of his wife, to his grandson, and all the money, if any, that should be remaining after payment of his wife's just debts, he gave to legatees named as tenants in common, equally. The widow died shortly after the testator, intestate:

*Held*, that she took an absolute interest in the residuary personal estate, and that it belonged to her next of kin: *Perry v. Merritt*, vol. xviii., V.-C. H., 152.

#### STATUTE OF FRAUDS.

In order to satisfy the requirements of the Statute of Frauds, the note or memorandum of an agreement for the sale of real estate must contain either the names of the contracting parties or such a description of them that there can not be any fair dispute as to their identity.

The term "vendor" is not of itself a sufficient description of one of the contracting parties.

Real estate was put up for sale under particulars and conditions of sale which did not disclose the vendor's name, but stated that B. was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase; and B. signed at the foot of this memorandum another, in these terms: "Confirmed in behalf of the vendor. B.":

*Held*, that the memorandum did not sufficiently show who the vendor was; and a bill for specific performance of the contract for sale was dismissed: *Potter v. Duffield*, vol. ix., M. R., 4.

#### VENDOR AND PURCHASER.—*Sale of Real Property—Incumbrances—Terms of existing Tenancies—Notice of.*

Part of an estate consisted of three farms in Hampshire, and in that county valuations between outgoing and incoming tenants for hay, straw and manure, are made at "fodder value," which is lower than what is called "market value." The three tenants of the farms held under verbal agreements from year to year, according to the custom of Hampshire. In April, 1868, the defendants, who were devisees of the estates on trust for sale, gave notice to the tenants to quit at Michaelmas, 1869, but the tenants alleged that they had been promised leases by the deviser, and ultimately it was agreed that if they would give up possession according to the notices, the half year's rent due at Michaelmas, 1868, should be remitted to them, and they should be entitled at the termination of their tenancies to be paid for hay, etc., at "market value." In June, 1868, the estate was put up for sale by auction. In the particulars and conditions of sale the three farms were described as in the occupation of the tenants respectively till Michaelmas, 1869, at certain rents; and certain incumbrances, subject to which the sale was made, were specified, viz., land tax and tithe re-

charge; but no express mention was made of the above mentioned agreements with the tenants. The conditions stipulated that the property should be taken to be correctly described as to quantity and otherwise, and that if any error, misstatement, or omission should be discovered, the same should not annul the sale nor should any compensation be allowed, and that the rents or possession should be received or retained, and the outgoings discharged by the vendors up to the 29th of September, and from that day by the purchaser. The property was bought in at the sale by auction, and afterwards sold by private contract on the 18th of July, 1868, to the plaintiff. The contract for sale, which was written on a copy of the above mentioned particulars and conditions, described the property purchased as the property mentioned in the foregoing particulars, and as being purchased subject to the foregoing conditions. At the time the plaintiff bought he had no knowledge of the above mentioned agreements with the tenants. Upon his becoming aware of and objecting in respect of them, it was agreed that he should complete without prejudice to his claim to be indemnified in respect of the agreements to pay the tenants market instead of fodder value for the hay, straw, and manure. The plaintiff afterwards paid the tenants the amount of the valuations of hay, etc., at market value, and now sought to recover the difference between that and fodder value from the vendors:

*Held*, that upon the true construction of the contract of sale there was nothing to show that the farms were to be conveyed free from the claim of the tenants to be paid at market value; but that the contract was to convey, subject to the existing tenancies, of which the agreements to pay market value formed terms, and that upon the authority of *James v. Lichfield* (Law Rep., 9 Eq., 51), notice to the plaintiff of the tenancies was notice to him of all the terms of such tenancies, and consequently that the action was not maintainable: *Philips v. Miller*, vol. ix., C. P., 196.

**WARRANTY.**—*Engineering Contract—Plans and Specification—Mode of Construction—Impossibility of Execution in mode specified—Implied Warranty.*

The defendants being about to erect a bridge, an engineer prepared for them, at their request, certain plans and specification, both of the bridge and of the mode in which it was to be constructed. The plaintiff, on the faith of these plans and specification, and without any independent inquiry whether the work could be done as specified, entered into a contract with the defendants to do it in accordance with the terms of the plans and specification. After the plaintiff had incurred great expense, it was found that the work could not be executed in the manner specified. The plaintiff sued the defendants on the ground of an implied warranty by them that the work could be executed in the manner described in the plans and specification:

*Held*, that no such warranty could be implied: *Thorn v. The Mayor, etc., of the City of London*, vol. ix., Ex., 163.

## SELECTED DIGEST OF STATE REPORTS.

[For this number of the REVIEW selections have been made from the following State Reports: 48 Georgia; 59 Illinois; 41 and 42 Indiana; 109 Massachusetts; 53 Missouri; 73 Pennsylvania; 37 Texas.]

### ACCOUNT.

1. M. and C. entered into partnership, M. contributing real estate at an estimated value, which was carried into the firm's stock account to M.'s credit. This was, in equity, partnership property, the legal title remaining in M.: *Clark's Appeal*, 72 Penn., 142.

2. The transferee of an open account may maintain suit on it in his own name, or he may sue in the name of the original creditor as a nominal plaintiff, for the use of himself, the transferee: *Mumms v. Swartz*, 37 Tex., 13.

3. When a person has been employed to state an account between parties, the latter are not bound by the account when stated, unless there was a definite agreement between them to that effect: *Reed v. Harris*, *Ib.*, 167.

4. A book containing transcribed items of an account, taken from the book containing the original entries, can not be used as evidence of the account: *Flats v. Brod*, *Ib.*, 634.

### ACTION.

1. One who has deposited his own money in a savings bank, in the name of another person to avoid attachment, may maintain an action for it against the bank in his own name, if he did not intend to make a gift or transfer to that person, and if he has tendered the pass-book to the bank, although he has given no bond of indemnity and has told the bank that the other person refused to transfer the book to him: *Broderick v. Waltham Savings Bank*, 109 Mass., 149.

2. A city authorized a canal corporation to change the grade of a sewer into which a street was drained, and into which a house was also drained, the owner of which consented to the corporation making the change on its promise to hold him harmless from the consequences. The drain became obstructed and the water flowed back into the house:

*Held*, that the owner of the house could maintain an action against the city, if the obstruction was caused by its negligence in maintaining and using the sewer for the drainage of the street, although the change increased the liability to obstruction: *Emery v. Lovell*, *Ib.*, 197.

3. The maker of a note secured by a mortgage with power of sale paid the interest due thereon, and the mortgagee promised to indorse the payment on the note, but did not do so, denied that interest had been paid, demanded it again, and threatened to sell under the mortgage unless the interest was again paid. The mortgagor then paid the interest a second time under protest:

*Held*, that he could maintain an action of contract to recover back the amount which the mortgagee promised to indorse: *McMurtree v. Keenan*, *Ib.*, 185.

### ACTIONS.

1. In an action to recover for injury to the plaintiff's dwelling house, resulting from dust, etc., thrown thereon from the defendant's flouring mill, it is not error to

instruct for the defendant, that a man has a right to erect a mill in a proper place, and to run and use it in a proper manner, and that it is not the policy of the law to hamper and retard, but to foster such property, in its proper and legitimate use, and that if the mill was in a proper place and used and operated in a proper manner, without material injury to the plaintiff's reversionary interest, then the jury should find for the defendant: *Cooper v. Randall et al.*, 59 Ill., 317.

2. Nor is it error in such case to instruct that the law does not give damages for every inconvenience or interruption of the rights of another. That there are annoyances which, by the nature and condition of society, must accrue to property of individuals, which do not in themselves create a legal liability. But the injury for which the law gives damages must be real and not simply inconvenience or trifling interruption: *Ib.*

#### ADMINISTRATION.

Certain unauthorized executions had been issued from the Probate Court on behalf of the creditors of an estate against the individual property of an administrator for sums claimed to be due them by him as administrator. Under the pressure of threatened levy, and under a mutual misapprehension as to the extent and value of assets in his hands, the administrator gave his individual notes for specified sums payable partly in cash, and partly on time. No abatement in the amount of the claims was made, and no compromise effected further than the granting of an extension of time. In consideration of the notes, the creditors surrendered and receipted for their claims. It afterwards transpired that the amount of assets in his hands had been miscalculated and overestimated in the Probate Court, and the amount charged against him was reduced accordingly by order of the Court. Suit having been brought against him upon the notes:

*Held*, that the administrator might properly show in defense that the notes were given under a mistaken impression of the extent of means in his hands, and that in point of fact there were no trust assets to which plaintiff had a right to look for payment. And, *semble*, that defendant might have no claim to the interposition of equity, because of his own negligence, except for the fact that the levies upon his own property placed him under duress: *Smith v. Paris*, 53 Mo., 274.

#### ADMINISTRATION OF ESTATES.

1. Where a claim against an estate was not filed until after the expiration of two years from granting the letters, the judgment therefor can only be paid out of subsequently discovered assets, and which had not been inventoried and accounted for, and in that regard the judgment should be special and not general: *Russell v. Hubbard*, 59 Ill., 335.

2. Where a party presents an account against an estate, he is limited in his recovery by the amount claimed, as much as a plaintiff is by the *ad damnum* in his declaration: *Ib.*

#### ADMINISTRATORS AND EXECUTORS.

An administrator who received Confederate money in 1862, and does not, by his returns, or on the trial of a suit commenced against him in 1871, give any explanation of what became of the money or what he did with it, can not complain at being held liable for the whole amount so received, especially when the verdict is for four years' less interest than what was due: *King v. Newton et al.*, 48 Ga., 150.

2. When plaintiffs sue in their representative capacity, on a note due to their testator or intestate, and there is no plea in abatement filed at the first term of the Court, the plaintiffs are not required at the trial term to prove that they have been

legally appointed executors or administrators. *Aliter*, if their letters testamentary or of administration constituted a part of their title to the property sued for: *Hazlehurst v. Morrison, Ib.*, 397.

3. When the maker and indorser of a promissory note are dead, and the administrator of the maker is also executor of the indorser, and suit is brought on the note against him in both capacities, though the judgment does not specify the relation of maker and indorser, it is good against him, at least so far as he is the representative of the maker, and if levy be made accordingly, he can not arrest it on that ground by affidavit of illegality: *Wolfolk, Adm'r and Ex'r v. Kyle, Ib.*, 419.

#### AFFIDAVIT OF DEFENSE.

K. sold oil to O., to be delivered December 31. In a suit for non-delivery of the oil, defendant offered to prove, 1. That about the time of delivery the principal oil dealers made a combination to create an artificial scarcity to compel defendant to pay extravagant prices or be liable for unnatural damages. 2. That the market value of oil was less than it had been raised to by the combination. 3. That plaintiffs being producers of oil, bound themselves with a railroad not to send oil except by that road, for the purpose of showing a combination to restrict the supply of oil:

*Held*, that the rejection of these offers was error: *Koutch v. Citizen Oil Company*, 72 Penn., 392.

#### AGENCY.

1. A special agent's authority is that which is given by the terms of his appointment, or that with which he is apparently clothed by the character in which he is held out to the world, although not strictly within his commission, and whatever is done under an authority thus manifested, is within the authority, and the principal is bound for that reason. He is equally bound by the authority which he actually gives, and that which by his own acts he appears to give. The principal is responsible for the appearance of authority: *Smith v. Board of Supervisors of Peoria County*, 59 Ill., 412.

2. When one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it: *Ib.*

3. Although an agent's authority may be special and limited, yet, if the principal permits such agent to advertise his name as agent generally, without noting such limitation, and the agent acts outside of his authority, the principal will be bound thereby, unless the party with whom he deals had notice of limitation: *St. Louis & Memphis Packet Company v. Parker, Ib.*, 23.

4. Although the act of an agent outside the scope of such agent's authority is not binding upon his principal, yet the principal may ratify such act and thus render it obligatory upon him: *Ib.*

4. An agent acting under a general authority from his principal to make the sale, sold to another two mules, and the principal subsequently ratified the sale by accepting from the agent the note given for the purchase money:

*Held*, the principal was bound by any warranty of the agent to the purchaser, in regard to the soundness of the mules: *Cochran v. Chitwood et al., Ib.*, 53.

5. While a person can not properly be the agent of both parties, buyer and seller, yet if he accepts the position of agent for the buyer, without disclosing the fact that he is agent for the seller, he can not afterwards repudiate such position to shield himself from liability to the buyer on the ground that he was agent for the seller. Having assumed the relation of agent for the buyer he must be held to a strict per-

formance of the duties, and to all the liabilities the relation imposes: *Cotton v. Holiday, Ib.*, 176.

6. Though the buyer may, in a proper case, repudiate the acts of the agent upon the ground that he was the agent of the seller, and did not disclose the fact: *Ib.*

#### AGENT.

Defendants had a "mercantile agency" in Pittsburg. Plaintiff delivered acceptances at defendants' office, payable in Memphis, and took a receipt for them "for collection," signed in defendants' name, from a person acting in their business. Two years afterwards a person from defendants' office got from plaintiff a power of attorney to enable defendants to collect the money, which defendants sent to their agent in Memphis. The defendants denied that they received the drafts for "collection," and that the receipt was signed by their authority:

*Held*, that these and similar facts were evidence for the jury as to the receipt being the defendants': *Bradstreet v. Everson*, 72 Penn., 124.

2. By giving the receipt "for collection," the defendants undertook themselves to collect, not merely to remit for collection to some responsible attorney: *Ib.*

#### AMENDMENT.

1. The system of pleading and practice in this State is exceedingly liberal, and extends to both plaintiff and defendant every facility for presenting in the same action every kindred demand or defense, and to this end a plaintiff may by amendment, present new matters for adjudication, and thereby increase or diminish his original demand: *Reed v. Harris*, 37 Tex., 167.

2. When a plaintiff has sued upon an open account, he is not thereby precluded from amending his petition, and alleging that the account had been settled by a binding agreement of all parties and that the defendant had acknowledged and promised to pay the balance found against him on the settlement, and it is immaterial that the settlement thus pleaded was made prior to the commencement of the suit, and that the plaintiff's demand, as based upon it, is greater than the sum claimed in his original petition: *Ib.*

3. Plaintiff brought an ordinary action *in personam* on a promissory note, but afterwards, by an amended petition, set up a mortgage and prayed foreclosure:

*Held*, that he was bound to serve the defendant with notice of the amended petition: *Hewitt v. Thomas, Ib.*, 520.

4. On a note given for land, an ordinary action *in personam* was brought against the maker in 1859. In 1866, the maker being then deceased, and the suit being still pending, the land was set apart to his widow and infant child as a homestead. In 1871, the plaintiff amended, asserting his vendor's lien, and making the widow and child defendants to the suit:

*Held*, that under this state of facts it must be presumed that he had lost or waived his lien before he asserted it in his amended petition, especially as he had stood by, without claiming a lien, and permitted the land to be set apart to the widow and child: *Lawler v. Yeatman, Ib.*, 669.

#### APPEAL BOND.

A complaint upon a bond given on appeal to the Supreme Court alleged that the Court granted the appeal and approved of the surety, that the bond was taken and approved by the clerk below, that the cause was certified to the Supreme Court, where the judgment was affirmed, and that it was still unpaid, but it did not aver that the penalty of the bond was fixed by the Court, or that the Court directed the time within which the bond should be filed, or that it was filed within the time, or

that execution and other proceedings were stayed upon the judgment during the pendency of the appeal:

*Held*, That the complaint was not sufficient on demurrer. Neither the Clerk of the Supreme Court, nor the clerk of the Court below, has power to take or approve an appeal bond when the appeal is taken in term. There was no consideration shown for the appeal bond. The question was not whether execution and other proceedings were in fact stayed on the judgment during the pendency of the appeal, but whether the bond was legally operative as a *supersedeas*: *Ham et al. v. Greve et al.*, 41 Ind., 531.

#### ARBITRAMENT AND AWARD.

Where exceptions to an award did not contain all the evidence submitted to the consideration of the arbitrators, a demurrer thereto was properly sustained: *The Barnesville Manufacturing Company v. Coldwell*, 48 Ga., 421.

#### ASSAULT.

In an indictment for assault and battery, it is not sufficient to charge that the defendant did use unlawful violence upon the person of another. The *gravamen* of the offense is the injury and the intent to injure, and the fact that the law will presume the intent when the injury is proved, does not dispense with the necessity of alleging the intent in the indictment: *Grayson v. The State*, 37 Tex., 228.

#### ASSIGNMENT.

1. Herr, a citizen of Pennsylvania, owning real estate there and in Maryland, made in Maryland an assignment for creditors, to Barry, of all his estate with preferences; the next day being advised that it was void as to the Pennsylvania estate, he made an assignment there to Lewis, reciting the first; this was recorded immediately; the first was not recorded within thirty days. Lewis received the rents and sold the real estate in Pennsylvania:

*Held*, that the deed to him passed nothing, and Barry was entitled to the balance in his hands: *Lewis v. Barry*, 72 Penn., 18.

2. At the common law, in an action on a promissory note, by an assignee thereof against the maker, the plaintiff is required to prove that the indorsement was made by the person by whom it purports to have been made, and where the indorsement is special, that the indorsee is the person described in it: *Hall v. Freeman*, 59 Ill., 55.

3. Though when the handwriting of the indorser is proved, possession of the note might be *prima facie* evidence of ownership: *Ib.*

#### ASSUMPSIT.

1. Miller, by writing, sold all the coal under a tract of land, with privilege to the vendee to use the railroad, tenements and other improvements of Miller, the vendee to remove the coal in forty years, at the expiration of which time, or on the removal of the coal, "the rights and privileges hereby granted, shall cease:"

*Held*, that the vendee had no right to use the improvements, etc., for removing, etc., other coal than that mentioned in the writing: *McCloskey v. Miller*, 72 Penn., 151.

2. The vendee used the improvements in removing, etc., coal on an adjoining tract:

*Held*, that this was an illegal use, but *assumpsit* was not the proper form of action: *Ib.*

3. *Assumpsit* is grounded on contract, and will not lie for use and occupation when there is no relation of landlord or tenant: *Ib.*

#### ATTACHMENT.

1. An affidavit made by the plaintiff in attachment that the debtor "is indebted to deponent, to the best of deponent's belief, in the sum of \$1,000, and that said—resides without the limits of the State," is not "a substantial compliance in all matters of form," required by the attachment laws of this State, and is fatally defective: *Black v. Scanlon*, 48 Ga., 12.

2. Where land was sold under a judgment obtained against the defendant in the United States District Court, of older date than the levy of an attachment returnable to a Superior Court of this State, but the levy of the execution, based upon said judgment, was made after the levy of said attachment, and the plaintiff in attachment was present at the Marshal's sale when the claimant purchased, and made no objections, the purchaser obtained a valid title: *Studdard v. Lemmond*, *Ib.*, 100.

3. A writ of garnishment, issued and served under an original attachment proceeding, holds all money or property belonging to the attachment defendant in the hands of the garnishee at the time the writ is served, not only for the original plaintiff, but for all creditors that may, under the statute, file claims under the original proceeding before the final adjustment thereof: *Ryan v. Burkam et al.*, 42 Ind., 507.

4. Where, after attachment proceedings have been commenced, a creditor of the attachment defendant files a complaint affidavit and undertaking, and there is anything in the record which shows an intention to file under the original proceeding, and not to commence an independent action, such creditor will be held to have become a party to the original action: *Ib.*

5. A person who has been served as garnishee in an original attachment proceeding, and who, at the time of service, has money in his possession belonging to the attachment defendant, can not deliver the money to the attorney of the attachment defendant, on being informed by the attorney of the plaintiff that the proceedings have been compromised and dismissed, and by such delivery be released from his liability as garnishee to another creditor of the defendant who has commenced proceedings by filing under the original suit, though the garnishee has not had actual notice of such filing: *Ib.*

6. A person who has been served as garnishee may shield himself from liability by delivering money or property in his possession to the officer serving the writ, or by paying the money into Court. If he fails to do this, he must retain the money or property until final adjustment of the suit: *Ib.*

7. Ross sued Hunter; judgment was rendered for Hunter; this was reversed; attachment executions were issued on judgments against Ross, and judgment recovered against Hunter as garnishee. He did not plead the attachment to the suit, as the case was about to be again tried; negotiations for a settlement were had, and Hunter agreed to confess judgment for \$280:

*Held*, that this sum was not subject to the attachments: *Hunter's Appeal*, 72 Penn., 343.

8. Hunter obtained a rule to have the judgment entered subject to the attachment; the rule was discharged:

*Held*, that the judgment was exclusive of the attachments: *Ib.*

9. The presumption was, that the settlement was with the understanding that the confession was exclusive of the attachments: *Ib.*

10. An affidavit for an attachment failed to state that the attachment was not sued out for the purpose of injuring the defendant:

*Held*, that the affidavit was fatally defective. The statute must be strictly followed in such cases, and any material variation from the letter of the law will vitiate all subsequent proceedings: *Burch v Watts*, 37 Tex., 135.

11. An attachment issued before the execution of the attachment bond, is fatally defective, and should be quashed on motion of the defendant: *Osborn v. Schiffer*, *Ib.*, 434.

12. A motion to quash an attachment was overruled because it was not made until after the parties had announced ready for trial: *Ib.*

13. A writ of attachment having been issued without petition, affidavit or bond, it was error at the return term of the writ to permit the petition, affidavit and bond to be then filed, *nunc pro tunc*: *Ib.*

14. To justify the suing out of an attachment on the affidavit of the attorney of the plaintiff, the mere belief of the attorney does not suffice. The grounds alleged must be actually substantiated: *Ib.*

#### ATTORNEY.

Where an attorney at law, in response to a summons of garnishment issued at the instance of a judgment creditor, answers that he has a certain sum of money in his hands belonging to the defendant, which, before he was served with such summons, he had decided to appropriate towards the satisfaction of other judgments than that upon which the process of garnishment issued, but had not actually done so, because he was awaiting the consent or refusal of the defendant to such action, it was not error in the Court to order the fund paid to the oldest execution, after allowing reasonable attorney's fees and costs to the diligent creditors bringing the fund into Court: *Carr v. Benedict, Hall & Co. et al.*, 48 Ga., 431.

#### AWARD.

1. An award in ejectment showed a plain mistake in fact in mis-describing the premises; it should have been sent back to the referees by the Court below for correction: *Kidd v. Emmett*, 72 Penn., 150.

2. The Court below having entered judgment on the award, the Supreme Court reversed the judgment, that the award might be sent back to the referees for correction: *Ib.*

#### BAILMENT.

1. Where A. is indebted to B., and transfers to him, as collateral security, a receipt given to A. for a note for collection, it being for a larger amount than A.'s debt to B., and the bailee who has the note for collection, with knowledge of the transfer and consenting thereto, permits it to go into the possession of A., who collects it and pays B. a portion of his debt, the measure of damages in an action of trover by B. against the bailee, is the unpaid portion of B.'s debt from A., as B. would not be liable over to A. for any balance. His claim for damages is limited to the amount of his special property in the note: *Sheldon v. Southern Ex. Co.*, 48 Ga., 625.

2. On the trial it was competent for the bailee to prove that when he was notified by A. and B. who were together, of the transfer, he was not informed that it was made as collateral security, but, on the contrary, it was stated by A. that the transfer was made only that the money might be paid to B. in the event that A. was absent, as he expected to be absent, provided B. was present when such a statement was made: *Ib.*

3. Under the facts as they appear in the record, it would have been proper to have submitted the question to the jury whether B. was present at the time A. made the statement to the bailee's agent: *Ib.*

4. A mere depository without special contract or reward, is liable for the loss of the deposit only in case of gross negligence, which is equivalent to fraud: *Scott v. Bank of Chester Valley*, 72 Penn., 471.

5. The degree of care required of such depository is that which he bestows on his own goods: *Ib.*

6. A bank which was such depository and exercising that degree of care is not liable for a larceny of the deposit, even by its own officers: *Ib.*

7. From such special deposit with a bank of money in packages, no consideration can be implied: *Ib.*

8. A bank received bonds on special deposit for safety from one of its customers, and at his risk, and placed them in a safe with similar deposits from others, and its own securities. The bonds were stolen by a teller. The theft by the teller was not connected with his employment, and there was no liability on the bank unless they knew or had reason to suspect he was not trustworthy: *Ib.*

9. The teller absconded, and it was then discovered that his accounts were false, and that he had robbed the bank during two years:

*Held*, that the bank was not bound to examine the teller's accounts for the benefit of a depositor who was a gratuitous bailee: *Ib.*

10. Negligence as a ground of liability must be such as enters in the cause of loss: *Ib.*

#### BANKRUPT LAW.

By the proviso of the 14th section of the General Bankrupt Law, all property exempted from forced sale by the laws of the several States is saved to bankrupts, and it seems that such exempted property can not be effected by a sale of the same, by a bankrupt's assignee, though made by order of a Bankrupt Court foreclosing a deed of trust. This Court, however, disclaims the right to review the proceedings of the United States Courts in Bankruptcy: *Maxwell v. McCune*, 37 Tex., 515.

#### BILL OF EXCHANGE.

If a draft be drawn on an individual, and the drawee, before its acceptance, form a partnership with others, and the partners agree to use in the business of the partnership the goods, for the payment of which the draft was drawn, and to pay for them, and they do so use them, and the partner who is the drawee accept the draft for the partnership, the acceptance is binding on the partners: *Markham et al. v. Hayzen & Sons*, 48 Ga., 570.

#### BILL OF EXCEPTIONS.

1. A statement in a motion for a new trial, that the Court refused to permit a witness to testify as to certain facts, can not be taken as true by the Supreme Court, unless sustained by a proper bill of exceptions: *Skillen v. Skillen, Jr.*, 41 Ind., 122.

2. If a demurrer to a paragraph of a complaint is overruled, and the paragraph is afterward struck out on motion, and not again put into the record by a bill of exceptions, it is not a part of the record, and the overruling of the demurrer to it can not be assigned as error: *Reeves et al. v. Plough, Ib.*, 204.

3. A question arising upon the action of a Court in striking out a paragraph of a pleading can only be reserved by a bill of exceptions: *Ib.*

4. Where the error assigned in the Supreme Court is the overruling of a motion for a new trial, and the paper copied into the record as a bill of exceptions was not

filed within the time limited by the Court, there is no question presented for decision on appeal: *Scrannage v. Russell et al., Ib., 277.*

5. A paper purporting to be a bill of exceptions, consisted of a certified agreement, signed by counsel of both parties and the Judge of the Court below, that "the following was all the evidence that was offered in said cause by both parties, together with all the exhibits, plats, maps, etc., and is submitted to this Court by the agreement of the parties as all the evidence," to which, after the signatures of the counsel and the Judge, were attached various documents, and what purported to be the evidence of witnesses:

*Held*, that the evidence was not in the record: *Goodwine et al. v. Crane, Ib., 335.*

#### **BILLS AND NOTES.**

1. Where the maker of a note given for the purchase money of land suffered the holder to procure judgment thereon, upon the strength of assurances from the latter that he intended to procure judgment merely to secure the debt, and that the judgment should be held in abeyance, and the holder afterward, without the knowledge or consent of the maker, caused the land to be sold under the judgment and bought it in:

*Held*, that the maker of the note might resort to equity to have the sale set aside on payment of the note, and other proper relief administered. A title so obtained could stand only as security for the re-imbursement of the debt: *Wright v. Barr, 53 Mo., 340.*

2. Where one becomes surety on a non-negotiable promissory note, on the express condition that another shall be procured as co-surety, and the latter fails to join, the surety will not be liable, although the note is in the hands of a holder having no notice of the agreement. As to the surety, while the condition remains unperformed, the instrument is merely an escrow, and there is no delivery: *Ayres v. Milroy, Ib., 516.*

#### **BOUNDARIES.**

To establish boundaries, monuments and lines marked on the ground may be identified by parol evidence. The common understanding of the neighboring community as to the identity of such monuments and lines is competent evidence, and the declarations of deceased persons, possessed of information on the subject, are admissible to fix the locality of corners and lines of survey. So it was also competent to prove that the corner in dispute had been recognized or pointed out by the adverse party as the true corner, and if it be proved that a common line between contiguous owners had been mutually recognized and established by them, they will be bound and concluded by it, though it be not the true, original line: *Smith v. Russel, 37 Tex., 247.*

#### **BURDEN OF PROOF.**

1. Defendant, with the consent of a turnpike company, crossed their road with a railroad for his individual use, and raised the bed of the turnpike, passing over it with a bridge. It was the duty of defendant to keep the bridge in repair. The bridge was eighteen feet wide and ten feet long, and originally had rails on each side, which had decayed, the plaintiff was found about midnight, on a dark night, lying under the bridge hurt; he said he had fallen from the bridge, but made no statement as to how he fell:

*Held*, the danger having arisen by the negligence of the defendant, that these

facts were evidence for the jury, that he had fallen for want of the rails, and that the burden was not on him to show that he was clear of contributory negligence: *Hays v. Gallagher*, 72 Penn., 136.

#### CARRIERS.

1. Delivery of produce to a common carrier, consigned to factors under a contract before that time made, is such a delivery to the latter as will cause their lien to attach for advances made: *Elliott v. Cox et al.*, 48 Ga., 39.

2. An action against a common carrier for negligence in the performance of his duty as a carrier, under a contract to carry, is an action upon the case *ex delicto*, and may be joined with a count in trover or trespass *vi et armis*; but if the action be for negligence alone, under the contract to carry, or if the counts in trover or trespass *vi et armis* be abandoned, the plaintiff can not repudiate the contract, either expressed or implied, under which the carrier received the goods, and recover for an unlawful taking: *Southern Express Co. v. Palmer & Co.*, *Ib.*, 85.

3. A carrier who received goods to carry from one not authorized to deliver them to him, is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be; but if a suit be brought against him as a carrier, charging him with having taken the goods under a contract with the plaintiff's agent, and with neglect of duty under the obligations of that contract, and there be no count for a wrongful taking or conversion, the plaintiff can only recover for a breach of duty, under the contract, as made with his agent: *Ib.*

4. When goods delivered to a common carrier for transportation were seized by legal process, and taken out of his possession by the sheriff, and the carrier forthwith gave notice to the consignor and consignee, and they made no reply and took no further notice of the proceedings:

*Held*, that the carrier had a right to presume they had abandoned the property, as subject to the legal process which had seized it: *Savannah, Griffin & N. A. R. R. Co. v. Wilcox, Gibbs & Co.*, 48 Ga., 432.

5. Where goods arrive at their point of destination, and the packages or casks, by the fault of the carrier, are in a damaged condition, so that they can not be handled without loss and further damages, it is the duty of the carrier to repair the casks, if possible, before the owner can be compelled to receive them; and if he refuse to do this, the owner may refuse to receive the goods and may recover the value, and this without offering to pay the freights, since the carrier has not completed his undertaking: *Breed, lessee, v. Mitchell*, 48 Ga., 533.

6. Goods are *prima facie* presumed to have been received by a carrier in good order for shipment, and if they were not so, it is for the carrier to show it: *Ib.*

7. Carriers, who have agreed with the consignee of goods to store them for him for a certain time, have a right, if he does not come for them within that time, to deliver them to a responsible warehouseman, and thus discharge their own liability, and, in an action by the consignee against them for the warehouseman's negligence, the jury may be justified in finding that the warehouseman was his agent and not theirs, although they gave him an order on the warehouseman for the goods, and although the warehouseman paid the freight to them, and, on being repaid the freight and paid for storage by the consignee, gave him as a receipt a bill of freight signed by them: *Bickford v. Metropolitan Steamship Company*, 109 Mass., 151.

8. A person left a sealed package containing treasury notes at the office of an express company to be carried to the town of B.; the company was not a common carrier to B.; the package was not carried to B.; demand was made therefor, and the company made search for it, but could not find it:

*Held*, that on these facts the company was not liable for money had and received, nor for conversion of the notes: *Pitlock v. Wells, Fargo & Co., Ib.*, 452.

#### CAUSE OF ACTION.

1. Plaintiff alleged the sale to the defendants of a stock of cattle, to be paid for by them in Confederate States bonds, and he alleged the illegality of the transaction and the worthlessness of the bonds, and sought judgment for the value of the cattle:

*Held*, that the action can not be maintained. The fact that the plaintiff himself renounces the illegal contract, can not entitle him to recover on a transaction void for illegality, and in which he was *in pari delicto* with the defendants: *Grant v. Ryan*, 37 Tex., 37.

2. Suit was instituted upon a promissory note given for service of negroes, rendered after the proclamation of emancipation:

*Held*, that the question as to whether or not the negroes were free from and after the proclamation of emancipation is immaterial in the case. The services having been rendered the plaintiff is entitled to recover, but whether for his own use or as trustee for the negroes, is left an open question: *Morris v. Ranny, Ib.*, 124.

3. An action can not be sustained by one partner against another for an account and recovery of profits made in Confederate money transactions; nor can such an action be sustained in respect of profits which may have been realized on dealings of a lawful character, when such dealings were so blended with Confederate money dealings that it is impossible to so separate the one class from the other that effect can be given to the legal transactions alone: *Lane v. Thomas, Ib.*, 157.

4. When a county treasurer collects taxes without authority of law he alone is responsible therefor, and an action can not be maintained either against his sureties or the county for the money so collected, even though the money be paid into the county treasury and disbursed as other funds of the county: *Wood v. Stirman, Ib.*, 584.

#### CERTIORARI.

1. The affidavit *in forma pauperis*, allowed by Sec. 3984 of the Code, to be made by a party applying for a writ of *certiorari*, can not be made for him by his attorney at law: *Selma, R. & D. R. R. Co. v. Tyson*, 48 Ga., 351.

2. Where a writ of *certiorari* has been granted, and the court dismisses the same on the ground of non-compliance by the petitioner, with some requisition of the statute, and plaintiff in *certiorari* makes application within three months from said dismissal for another writ, he is not barred by lapse of time from having his second application heard: 32 Ga. R., 487; *Grimes v. Jones, Ib.*, 362.

3. The facts set forth in the application for the writ of *certiorari* in this case entitles the plaintiff to the granting of the writ: *Ib.*

4. Where a party had been duly served with summons in a cause pending against him in the city court of East St. Louis, the mere fact that the plaintiff's name was written Bulter in the summons instead of Butler, as it was upon the docket, was

*Held*, not to be a sufficient excuse for his failure to appear and defend the suit, nor would it afford sufficient ground for the statutory writ of *certiorari* to remove the cause into the Circuit Court: *Hirman v. Butler*, 59 Ill., 225.

5. In such case the party sued knowing there was a suit against him, should have appeared, and if the plaintiff's name was wrong in the summons he should have pleaded in abatement. He could not neglect his proper defense, and then have his writ of *certiorari*: *Ib.*

## CHANCERY.

1. A father, upwards of seventy years of age, induced by the promise of his son to support him and his almost equally aged wife in comfort during the remainder of their lives, conveyed his farm to his son's wife, and transferred to his son all his personal property. The son took possession of the farm, and by his continued unkindness and ill treatment, in little upwards of a year, compelled his parents to leave and take refuge with another child. Upon bill filed by the father to rescind contract, it was

*Held*, if the rescission of the contract, in cases of such character, could not be referred to any other head of equity jurisdiction, it would be proper to presume that it was made in the first instance with a fraudulent intent: *Oard et al. v. Oard*, 59 Ill., 46.

2. And in this case, no accident or misfortune, or unforeseen event of any kind, having prevented the son from executing his agreement, and the records disclosing no provocation of any sort, nor any attempt at justification, the inference was regarded as unavoidable that the son procured the deed from his father with intent to treat him in the manner he did: *Ib.*

## CHARGE OF COURT.

1. It is not error for the court, in a charge to the jury, to state hypothetical illustrations of a legal principle, unless it be done in such manner as would imply that they were intended to be used as facts which had been proven by the evidence: *Sharpe v. The State*, 48 Ga., 16.

2. If a written request be made to charge, legal in its terms and pertinent to the matter on trial, it is the duty of the Court to charge at least the substance of it; it is not enough, if by inference it may be covered by some other charge, unless that inference be very plain and noticeable: *Wood v. The State*, *Ib.*, 192.

3. When the general charge of the Court as to the negligence was correct, an omission to charge as to any particular fact in the testimony connected with that question, was not error. If a more specific charge had been desired, it should have been requested: *Headrick & Bro. v. Virginia and Tennessee Air Line Railway Company*, *Ib.*, 545.

4. In an action against a physician for damages arising out of his unskillful treatment of a patient, the Court below instructed the jury that if they believed that the plaintiff was injured by the unskillful treatment, ignorance, carelessness or neglect of the defendant as a physician, they should find for the plaintiff:

*Held*, that it was error to instruct the jury as to carelessness or neglect, as no damages were sought on those accounts, and the decree of the Court can not exceed the prayer of the petition: *Payne v. Francis*, 37 Tex., 75.

5. When the facts of a case require a knowledge on the part of the jury of the different classes or kinds of evidence, it is the duty of the Court to charge them, in general terms, as to the distinguishing characteristics of those different kinds, and the credit which under ordinary circumstances may be placed upon evidence of either class; but under our statute, the Court will not as a general rule, be authorized to refer the jury to any particular evidence before them, and characterize it as the highest or other degree of evidence: *Walker v. The State*, *Ib.*, 366.

## CITY.

1. Where the complaint in an action against a city alleged that a certain bridge in said city was out of repair, and the planking loose, etc., and that after the plaintiff had driven his horses upon the bridge with a loaded wagon, and was using

due and reasonable care on his part to draw forward said load, the horses were injured through the defects in the bridge:

*Held*, that the complaint was bad on demurrer, because its allegations did not show that the plaintiff used due care in driving upon the bridge, or that he was ignorant of the condition of the bridge, and because there was no general averment that the injury occurred without his fault. If the plaintiff knew of the true condition of the bridge when he drove upon it there could be no recovery:

*Held*, also, that the negligence of the city in not repairing the bridge, did not relieve the plaintiff from the duty of using due care: *Riest v. The City of Goshen*, 42 Ind., 339.

2. If dirt is dug up and removed from an alley in a city, thus rendering the alley impassable, and causing injury to adjoining property, and no order or ordinance of the city has authorized the same, and it is not done under a contract with the city, an action by an adjoining property owner will lie for damages sustained by reason of such removal: *Mussleman v. Manly*, *Ib.*, 462.

#### CLAIM.

When a mortgage *fi. fa.* for the sale of a parcel of land was, under the orders of the plaintiff's attorney, levied on the land, and the same was sold at sheriff's sale, and the money raised applied to the *fi. fa.*, and subsequently, on a statement that the *fi. fa.* was lost, the plaintiff procured an *alias fi. fa.* to issue (taking no notice of the sale) and caused it to be again levied on the land, and a claim was interposed by one claiming under the defendant in the mortgage:

*Held*, that the claimant may attack the plaintiff's *fi. fa.* by showing that the orders had been complied with, and the land sold according to its commands, and that it was not competent for the plaintiff in reply to show that said sale was illegal, it having been made whilst there was a pending injunction prohibiting said *fi. fa.* from proceeding. The Court will not permit the plaintiff to set up his own wrong; said sale and the return thereof are existing facts, and until set aside by a proceeding for that purpose, can not be treated as null by the very party who thus disobeyed the order of the Chancellor: *Horton & Rikeman v. Kohn*, 48 Ga., 183.

#### CONFEDERATE STATES.

Where a trustee received a large sum of money in April, 1860, and in February, 1864, obtained an order from the Judge of the Superior Court, authorizing him, as trustee, to invest the fund then in his hands in Confederate money, in Confederate bonds, which was done, and the same became worthless, it was error to charge that the order of the Judge of the Superior Court was conclusive proof that it was trust money which was so ordered to be invested: *Westbrook, trustee, v. Davis et al.*, *Adm'r*, 48 Ga., 471.

#### CONSTABLE.

1. A paper issued by a Justice of the Peace to a constable, reciting the rendition of a judgment, as appears of record on his docket, and adding the words "by levy and sale of the goods" of defendant, "and make return thereof within six months from date," without other words of command or direction, will not justify a levy by the constable: *Gaskill v. Aldrich*, 41 Ind., 338.

2. Personal property must be present and subject to the view of those attending a constable's sale. And the sale, in good faith, by a constable, of a hog, in a pen from one to two hundred rods from the place of sale, and entirely out of sight, is unauthorized: *Ib.*

## CONSTITUTIONAL LAW.

1. The Legislature in the exercise of the right of eminent domain, may authorize the appropriation of private property to public uses, or servitudes, but the appropriation can not be made without fair compensation in money being first made to the owner. Benefits expected to result to the owner from the public use, can not be offset against the compensation to which he is entitled: *Paris v. Miller*, 37 Tex., 407.

2. The Constitution of this State absolutely forbids the alienation of homestead property by the husband without the consent of the wife, and such a sale therefore is an absolute nullity, and the purchaser acquires no title whatever: *Rogers v. Renshaw*, 37 Tex., 625.

## CONTINUANCE.

1. Excitement in the public mind, and excited public feeling in the county in which a crime has been committed, is not alone sufficient to authorize the continuance of a case: *Johnson v. The State*, 48 Ga., 116.

2. Where a Justice of the Peace is charged with false imprisonment under color of legal process, the warrant under which the arrest was made being set out in the indictment, he is not entitled to a continuance on account of the absence of a witness by whom he expects to prove a parol commitment of the person arrested for contempt of Court: *Campbell v. The State*, *Ib.*, 353.

3. Where the defendant in a criminal action moving for a continuance on account of the absence of witnesses, shows the competency of the witnesses, the materiality of their testimony, that they have been duly and legally summoned, and the other facts specially required by the statute, he is entitled to a continuance without regard to the cause of their absence. The Court must decide the motion for a continuance upon the facts stated in the affidavit alone, accepting the same as true, and on appeal this Court will not look at the evidence given on the trial, but to the affidavit alone: *Cutler v. The State*, 42 Ind., 244.

## CONTRACT.

1. Where it is represented and guaranteed, that a stock of goods will inventory at "wholesale prices" a certain sum, the language will be taken to mean the wholesale prices at which they were purchased, and not the value that may be put upon them at the time the representation and guaranty are made: *Dodge et al. v. Durham*, 41 Ind., 186.

2. Where A. delivers a sum of money to B., on his promise to deliver the same to C., as a gift from A., the money may be recovered from B. on his refusal to deliver it, by C. in an action for money had and received to his use: *Miller v. Billingsly*, *Ib.*, 489.

3. In actions at law, privity of contract is essential; the rule is otherwise in equity, and the systems being blended in this State, a party not known as a contracting party, but for whose benefit the contract was made, may maintain a suit to enforce the contract under the Code, even although ignorant of the contract at the time when it was made, if when informed thereof he accept the provisions. The party receiving the money is treated as a trustee for the beneficiary: *Ib.*

4. By written contract, free from ambiguity, H. purchased of R. & Co. a certain engine and mill, at the price of three thousand dollars, to be paid on a fixed future day, in cotton at eight cents per pound. The written contract recited that H. had fully and satisfactorily examined the engine and received and accepted the same:

*Held*, that H. is precluded from all inquiry as to the character or value of the article, unless he shows that R. & Co. fraudulently concealed defects in it at the time he examined it.

*Held*, further, that if the contract be not thus vitiated by fraud of R. & Co., their measure of damages is the highest market value of the cotton at the place of delivery between the day of delivery and the day of trial: *Ranger v. Hearn*, 37 Tex., 30.

5. It is now the well-established doctrine that when a transaction is tainted with illegality, no legal or equitable rights can result from it. And it is immaterial whether the illegality be part of the cause of action, or be merely introductory to it; if the plaintiff requires any aid from the illegal transaction, in order to make out his case, he can not maintain the suit: *Grant v. Ryan*, *Ib.*, 37.

6. A contract made and to be performed in New Orleans during the rebellion, in consideration of a loan of currency issued by the so-called Confederate States, and which, according to the subsequent decisions of the Supreme Court of Louisiana, is void under Art. 2026 of the Civil Code of that State, which declares that "every condition of a thing impossible, or *contra bonos mores*, or prohibited by law, is null, and renders void the agreement which depends on it," is void in this Commonwealth: *Stevenson v. Payne*, 109 Mass., 378.

7. A suit was settled by the plaintiff's attorney, upon the defendant's paying a sum as damages, and also his fees:

*Held*, that the plaintiffs could not rescind the settlement as unauthorized upon tendering to the defendants only the amount paid by them as damages: *Peru Steel and Iron Company v. Whipple File and Steel Manufacturing Company*, *Ib.*, 464.

8. Ignorance is considered willful when the person neglects the means of information which ordinary prudence might suggest, and ignorance of a man's own rights conferred by an instrument actually in his possession or power, when the other party is innocent of concealment or of any conduct contributing to keep him ignorant of its contents, will not excuse the performance of the conditions imposed on the person claiming under the instrument: *Thieband v. First National Bank of Vevay*, 42 Ind., 212.

9. In an action to recover on an account for boarding the wife and children of the defendant, it appeared in evidence that the plaintiff boarded said wife, who was his sister-in-law, and said children, for a number of weeks at his home, having contracted therefor with her, and having no knowledge of her separation from her said husband when she engaged board, that said husband and father during the time of said boarding resided at a distant part of the State, and that he had a home for his said wife and children and provided for them, and had the home and provisions for them during the time of their boarding, which they did not need and which was not contracted for or authorized by him:

*Held*, that these facts did not render the defendant liable for the board of his wife or children: *Wallace v. Ellis*, *Ib.*, 582.

#### CONTRIBUTORY NEGLIGENCE.

It is not necessary to prove affirmatively that a person injured when crossing a railroad on a public highway had stopped and looked up and down the railroad; whether he used all the precautions, is to be determined by all the circumstances of the case: *Penn. Railroad v. Weber*, 72 Penn., 27.

#### CONVERSION.

1. A testator gave to his wife personal property, "and the whole of my real estate during her life if she remain my widow, but if she marry again, she is to have but half of my real estate during her life. At my wife's decease, my real estate to be sold and equally divided among my nephews and nieces, namely, my brother Alexander's children, Sarah, and others (naming each), and my sister Margaret Kelly's children (naming each), each to have an equal share:"

*Held*, (1) that the direction to sell was a conversion. (2). The legacies to the nephews and nieces were vested: *McClure's Appeal*, 72 Penn., 414.

2. Sarah married and died in the life-time of the widow, intestate and without issue:

*Held*, that her husband surviving was entitled to her legacy: *Ib.*

3. To work a conversion the direction to sell must be positive and explicit, irrespective of all contingencies, and independent of all discretion: *Ib.*

#### CONVEYANCES.

1. Where a vendor of land executed a deed and left it in the hands of the officer taking the acknowledgment, to be, by him, delivered to a third person who was to hold it as an *escrow* until the purchase money should be paid, but without ever having come to the hands of him who was to hold it as an *escrow*. The deed was placed on record without the knowledge or consent of the grantor; it was

*Held*, the agreement between the parties that the deed was not to be delivered or recorded until the purchase money should be paid, continued until changed by the consent of the grantor, and a subsequent purchaser from his vendee, with notice, would hold subject to the rights and equities of the first vendor, arising from such agreement: *Ill. Central Railroad Co. v. McCullough*, 59 Ill., 166.

2. In case of a sale of land by the first vendee, and the acceptance by his vendor of the notes of the second purchaser for the unpaid purchase money due the former, together with a mortgage from the latter on the same premises, to secure such notes which were taken in lieu of the notes given by the first purchaser, a recognition by the original vendor of title in the mortgagor, would be implied thereby, and his assent to the delivery of his deed to his vendee: *Ib.*

3. Where the grantee in a conveyance performed no part of the condition or consideration without which the deed was not to vest title, no formal entry for condition broken would be necessary on the part of a grantor, who had remained all the time on the land: *Moore v. Wingate*, 53 Mo., 398.

4. The grantor in a deed made on condition, may after entry for condition broken, transfer the estate to a third party, or he may convey where the estate was only to vest on the performance of a condition which remained unperformed. And the transferee in such case, having a plain remedy at law, must resort to ejectment to dispossess the grantee in the original deed, and can not invoke the aid of Chancery, unless where defendant in maintaining his claim would be shown to be throwing a cloud upon his title: *Ib.*

#### CORPORATIONS.

1. A member of a chartered company may, by his acquiescence or presumed assent, become bound by the acts of his company, and thereby be disabled from setting them up as a defense, when he could have set them up were it not for such presumed ratification: *May v. Memphis B. R. R. Co.*, 48 Ga., 109.

2. The original contract between the stockholders of a railroad company, as contained in the charter, can not be materially or essentially altered by an amended charter, so as to bind the subscribers thereto without their consent: *Ib.*

3. A foreign corporation transacting business in this State, may be garnisheed for a debt it may owe anywhere in this State where suit for such debt could be brought: *Selma, R. & D. R. R. Co. v. Tyson*, *Ib.*, 351.

4. The Legislature of another State authorized a corporation, owning a railroad there, and consolidated with a corporation owning a railroad in this State, to extend its line of road, and increase its capital stock for the purpose. At that time it was lawful both there and here, and it has remained lawful there for any corporation to

issue new stock to its shareholders at par, without regard to its market value. A statute was then passed here, prohibiting any such consolidated corporation from extending its railroad, or increasing its capital stock, without previous consent of the Legislature of this State, but providing that nothing therein contained should be construed to prohibit that particular corporation from extending its road under the authority granted by said other State; and afterwards, on the same day, another statute was passed here, providing that any railroad corporation, authorized to increase its capital stock, should sell the new shares at auction, if the market value of its shares exceeded their par value:

*Held*, that the corporation in question, under the authority granted by said other State, might increase its capital stock, without further permission of the Legislature of this State, and might lawfully issue the new stock at par to its shareholders: *Attorney-General v. Boston and Maine Railroad*, 109 Mass., 99.

#### COVENANTS FOR TITLE.

A remote grantee of lands may maintain an action in his own name against the original grantor, on a covenant in the deed of the latter, "that the said lands are free from all encumbrances," where the substantial breach of the covenant occurs after the assignment, and the whole actual damages are sustained by the assignee. Although in such case the covenant is nominally broken on the execution of the deed, the rule of the common law, that choses in action are not assignable, does not apply: *Richard v. Bent*, 59 Ill., 38.

#### CRIMINAL EVIDENCE.

1. As a general rule, a distinct crime, unconnected with that in the indictment, can not be given in evidence against the defendant: *Shaffner v. Commonwealth*, 72 Penn., 60.

2. That one crime may be evidence of another, there must have been a connection between them in the mind of the criminal, or the person must be so identified as to show that one committed both: *Ib.*

3. Should the Judge not clearly see the connection, the defendant should have the benefit of the doubt, and the jury not be prejudiced by an independent fact, not evidence of the particular guilt: *Ib.*

4. Defendant was indicted for murdering his wife by poison; there was evidence of his criminal intimacy with the wife of another man, on whose life was an insurance, the proceeds of which, on his death, the defendant endeavored to procure:

*Held*, that evidence that the husband died with the same symptoms as defendant's wife, and that he had been attended at the defendant, was inadmissible: *Ib.*

#### CRIMINAL LAW.

1. If the evidence contained in the record does not show where the offense was committed, of which a defendant is found guilty, and there be an assignment of error that the verdict was contrary to law, a new trial will be granted: *Carter v. The State*; *Merriwether v. The State*, 48 Ga., 43.

2. Where a defendant, on trial for murder, objects to evidence showing that he killed James Little, on the ground that the indictment charges him with the murder of James Lutle, and the presiding Judge, on inspection, held the name to be James Little, and all the testimony proved that to be the name of the party slain, this Court will not, by an examination of the original indictment, overrule the judgment of the Court below. The testimony in case of conviction is made a part of the record in the case, and had the defendant been acquitted, and afterwards been again

put on trial for the murder of James Little, the introduction of the whole record would have sustained the plea of *autrefois acquit*: *O'Neil v. The State, Ib., 66.*

3. Where the Court charged the jury "that every witness in the case is to be believed until impeached in some one of the modes known to the law, a jury can not arbitrarily, of their own motion, set aside the evidence of any witness; the presumption of innocence attaches to witnesses which remains until removed by proof," and there was no impeaching evidence, unless the statement of the defendant not under oath shall be considered as such, in reference to which the Court charged the jury "that they were the exclusive judges of the weight that was due to such statement," the charge was not erroneous: *Jones v. The State, Ib., 163.*

4. On the trial of an indictment for carrying deadly weapons, the proof was that accused purchased two pistols in the town of C., and for the purpose of obtaining balls for the pistols he carried them from the store where he purchased them to one or more places where ammunition was sold, and from thence to his home, some fifteen miles distant:

*Held*, that these acts did not constitute a violation of the spirit of the law regulating the keeping and bearing deadly weapons, and the Court below erred in instructing the jury that there was a violation of the law. There can be no violation of a criminal law without an intention to violate it: *Waddel v. The State, 37 Tex., 354.*

5. An instrument of writing which does not, upon its face, import any value or obligation, can not be the subject of a forgery. See the facts of this case for an illustration of the principle: *Howell v. The State, Ib., 591.*

#### DAMAGES.

1. When a suit was brought against a railroad company for damages caused to the plaintiff by his falling into an excavation made by the company across the public highway, and it appeared in proof that the public highway had for years run in a particular place; that on the approach of the railroad constructors to that place, the road had been turned so as to take a different route; that within a week or ten days after the change, the plaintiff, travelling the road with his wagon and team had taken the old route, it being in the night, and had been stopped by the cut or excavation; that he had got out of his wagon to see what was the matter, and in passing to the front had fallen into the cut and broken his thigh, so as to cause him great pain, expense and loss of time, and so as to lessen his effectiveness as a working man one-fourth, for life, and so as to shorten his leg by three inches:

*Held*, that the measure of damages in such a case is the actual injury suffered. This may include bodily and mental suffering. And when the Court added to this charge that the jury might include "the injury to his pride, his manhood," that whilst the latter language is not strictly accurate, yet, as the proof shows that the plaintiff was permanently deformed by being lamed for life, the jury may well have understood the Court as referring by his words to this deformity, and as the verdict is not excessive this court will not disturb it: *Atlanta & R. A. L. R. R. Co. v. Wood, 48 Ga., 565.*

2. Where A. is indebted to B., and transfers to him as collateral security a receipt given to A. for a note for collection, it being for a larger amount than A.'s debt to B.; and the bailee, who has the note for collection, with knowledge of the transfer and consenting thereto, permits it to go into the possession of A., who collects it and pays B. a portion of his debt, the measure of damages in an action of trover by B. against the bailee, is the unpaid portion of B.'s debt from A. As B. would not be

liable over to A. for any balance, his claim for damages is limited to the amount of his special property in the note: *Sheldon v. So. Ex. Co.*, 48 Ga., 625.

3. The plaintiff was owner of land through which a railroad was constructed; without receiving damages she sold the land, the company afterwards settled with the purchaser and paid him the damages:

*Held*, that she could recover the amount from him: *McFadden v. Johnson*, 72 Penn., 335.

4. The damages were a personal claim of the owner when the injury occurred; they did not run with the land nor pass by the deed, although they were not reserved: *Ib.*

5. The plaintiffs in August agreed to deliver to the defendant, as ordered, monthly throughout a year, logs averaging a certain diameter, the defendant having the option to determine the contract, paying to the plaintiffs the cost of the logs cut and ready for delivery or afloat, which they might have on hand in view of their engagements under the contract. The defendant in October terminated the contract, the plaintiffs then having on hand some logs afloat, and others cut in the woods but not removed. These logs were measured by the agents of both parties in January and found to be almost all of less than the specified diameter:

*Held*, that in the absence of evidence that the plaintiffs had acted unreasonably or in bad faith, the defendant was liable for the cost of all these logs, and not of such only as would average the specified diameter: *Wolf v. Boston Veneer Box Co.*, 109 Mass., 68.

6. Municipal corporations are bound to keep their streets in a reasonably safe condition. Failing to do so they will be liable for all injuries resulting from their negligence: *Basset v. City of St. Joseph*, 53 Mo., 290.

7. The liability of municipalities for damages caused by excavations, is not restricted to cases where they actually extend into the street, if travel is thereby rendered dangerous; the authorities are equally bound to protect the public, whether they encroach on the highway or not. And the city is bound for damages resulting from neglect of proper precautions, even though the excavations were not made by its own agents, provided it had received due notice of the existing facts: *Ib.*

8. In a suit against a city to recover damages for injuries caused by plaintiff falling into an excavation adjacent to a market place, where it appeared that the authorities were notified of the dangerous condition of the thoroughfare, and took no steps to guard the public from accident, and the evidence showed that the plaintiff, at the time of the casualty, was exercising ordinary care and prudence, plaintiff would be entitled to recover, although it further appeared that the primary cause contributing to the injury was the attempt of a mule to kick plaintiff, and that, in avoiding this peril, he fell or jumped into the excavation: *Ib.*

#### DEBTOR AND CREDITOR.

1. Where a party is solicited to make a loan, and to procure the means of so doing must spend time and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious: *Atlanta Mining and Rolling Mill Co. v. Guyer*, 48 Ga., 9.

2. Where an excess over the legal interest is paid for other good and valuable consideration beyond the mere use of money, it is not usury: *Ib.*

3. One creditor holding a common law judgment, where the debtor is involved or unable to pay all his debts, can not enjoin another creditor in a common law judgment older than the first, on the ground that the latter had received from the debtor

a sufficient amount of usury to discharge his existing judgment, and, from that fact ask a decree, either that such judgment be declared satisfied, or postponed until the senior judgment is paid: *Phillips et al. v. Walker, Ib., 55.*

4. Where it is claimed by the junior judgment creditor of a debtor, who is unable to pay his debts, that the holder of the oldest judgment purchased another judgment younger than either of the others, for about one-fifth of the amount, under an agreement that the debtor was to have the benefit of the surplus, and, by agreement between the creditors, they released their judgment liens upon a certain portion of the debtor's property, which the debtor was to sell and pay a large portion of the proceeds to the creditor who held the oldest execution, and it was so sold and nearly all the portion paid to said creditor, applied to the payment of the whole of the judgment so purchased by him, and on the hearing of an injunction to restrain such creditor from selling the balance of the debtor's property, under the oldest *fi. fa.*, and claiming the whole of the proceeds under it, and asking that the money so appropriated shall be credited to the oldest execution, the evidence being conflicting and the Chancellor grants the injunction, this Court will not interfere with his discretion in so doing: *Ib.*

#### DECEDENTS' ESTATES.

Where real estate of a decedent was sold by the administrator, under an order of Court, for the purpose of paying debts of the deceased, but no notice was given of the pendency of the petition for the sale, but a writing containing a waiver of notice and consent to the sale was signed by the widow as guardian of minor heirs, but not in her own right as widow:

*Held*, in an action for partition brought by the widow, that the sale did not pass the widow's one-third of the real estate to the purchaser, and that the record of the proceedings and order of sale were inadmissible in evidence to show the sale of said one-third: *Helms v. Love, 41 Ind., 210.*

#### DECREE.

Where a grantor of land sought by bill in chancery to rescind the deed, making his grantees, and also a tenant in possession, parties defendant, and a decree was rendered setting aside the conveyance, but directing that the complainant pay to the "defendants" a certain sum for improvements:

*Held*, as all the defendants would, by the terms of the decree, be entitled to participate in the sum so directed to be paid, when the tenant was not entitled to any part of it, the decree was, to that extent, erroneous: *Oard et al. v. Oard, 59 Ill., 46.*

#### DEDICATION.

1. A primary condition of every valid dedication is that it shall be made by the owner of the fee: *Baugan v. Mann, 59 Ill., 492.*

2. In a suit to enjoin the defendant from erecting a building on a certain parcel of ground, on the allegation that the *locus in quo* had been dedicated as an alley by a former owner of the fee, from whom the complainant deduced title to a lot adjacent to such alley, it was not shown that the person who made the alleged dedication had title to the premises, nor did it appear that the defendant claimed title under him, so the complainant failed in his proof, it being essential to the validity of the dedication that the person making it was the owner of the fee: *Ib.*

3. In the year 1817, the owner of the land upon which the town of Golconda, Pope County, in this State, is situated, laid off the same into town lots, streets and alleys, and made and recorded a plat of the town thus laid out. A memorandum was endorsed on the plat defining the width of the streets and alleys, "excepting

Water street which includes all of the ground from the front lots to the river." The plat was not signed or acknowledged. At that time there was no statute regulating the execution of town plats. This was held to be a sufficient dedication by the common law, to the public, of all the ground between the lots fronting on the Ohio river and the river itself: *Field v. Carr et al.*, *Ib.*, 198.

#### DELIVERY.

1. L. made deeds to several children and gave them to M., to be recorded after his death, and handed to the grantees:

*Held*, the delivery by relation took effect when they were delivered to M.: *Stephens v. Rienhardt*, 72 Penn., 434.

2. No declarations of L. after the delivery to M., except such as would countermand the delivery to the grantees, would be evidence: *Ib.*

3. When the future delivery is dependent upon a condition, the deed is an escrow, when to await the lapse of time or a contingency, it is the grantor's deed presently, but will not take effect until the second delivery, but then by relation to the first: *Ib.*

4. An escrow operates only from the performance of the condition and actual delivery to the grantee, except where a relation to the first delivery is necessary to give effect to the deed or intermediate conveyance of the grantee: *Ib.*

#### DISTRIBUTION.

1. Proceeds of a sheriff's sale being in court for distribution, on petition and affidavit alleging fraud, the Court awarded an issue to the right to the fund. On trial of the issue the jury failed to agree and were discharged. The Court being of opinion that there was no evidence of fraud, on application struck off the issue:

*Held*, to be error: *Dormer v. Brown*, 72 Penn., 404.

2. When it appears on the trial that there is no evidence of the allegations on which it was granted, the Court should so instruct the jury, and the ruling could be reviewed in the Supreme Court: *Ib.*

3. In a proceeding for distribution no one can claim but through the decedent, as creditor, legatee or next of kin: *McBride's Appeal*, *Ib.*, 480.

4. In distributing the estate of a deceased wife, the husband is not a competent witness before the auditor in support of a claim as creditor against her estate: *Ib.*

#### DOWER.

1. Where the only allegation in a bill seeking to enjoin the defendant from prosecuting her claim for dower, in the lands of which her husband died seized and possessed, was that she, "after possessing and enjoying the assets of said estate to a large amount in excess of her lawful dower, and wasting the same by pleading and otherwise, has made application to the Superior Court to set apart her dower in said estate," which charge was expressly denied by the defendant's answer, it was error in the Chancellor to direct that the writ of injunction should issue: *Kenan v. Johnson*, 48 Ga., 28.

2. In a proceeding by petition for assignment of dower, where the report of the commissioners appointed to assign dower stated that they were duly sworn in open Court, but the character of the oath taken nowhere appeared in the report or other portions of the record:

*Held*, this omission in the record was fatal. The statute is peremptory that the commissioners shall take an oath, and what it shall contain is specifically prescribed. It must appear that the oath conformed to the requirements of the statute: *Durham v. Mulkey*, 59 Ill., 91.

**DURESS.**

To a suit on a written obligation executed in May, 1867, defendant pleaded that the instrument was executed by him under duress of imprisonment, imposed by a United States military officer at the instance of the plaintiff:

*Held*, that the plea was subject to general exception for insufficiency, because it failed to allege the act of the officer was illegal and that he had no authority to arrest and imprison the defendant:

*Held*, further, that to constitute the imprisonment a defense to the suit, the defendant must show that it forced him into a contract under which he has suffered, or is about to suffer, some wrong or injury, and if the plaintiff shall show that the contract was an equitable one, and one which the defendant is bound to comply with, having derived benefits from it, then the imprisonment can not be held a defense to the action: *Dillin v. Johnson*, 37 Tex., 47.

**EJECTMENT.**

1. P. on behalf of ten, purchased land; they took possession, made improvements, and were afterwards incorporated. Afterwards M. purchased the land at a treasurer's sale for taxes, the corporation brought ejectment against him:

*Held*, that a deed to the corporation executed and delivered after the commencement of the suit, was evidence for the plaintiff: *Rockland and Vernango Coal and Oil Company v. McCalmont*, 72 Penn., 221.

2. The purchaser, unless his purchase at the treasurer's sale be valid, was an intruder and could not contest the validity of the sale as between the holders of the legal title and the purchaser: *Ib.*

3. The entry and possession of the land by the corporation, with the consent of the holders of the legal title, was a title under which the corporation could recover in ejectment against a worthless title: *Ib.*

**ELECTION.**

Where a majority of the ballots at an election are given to a candidate who is not eligible to the office, the ballots so cast are not to be counted for any purpose. They can not elect the ineligible candidate or defeat the election of the opposing candidate by showing that he did not receive the majority of the votes cast at such election. It follows that the eligible candidate will receive the office, although less than a majority of the votes are cast for him. But this does not apply where two or more persons are candidates for different offices, accordingly, although the office of one prison director is the same as that of another prison director, except it may be with reference to the time of election and the term for which he is to serve, still when one has been elected to succeed a designated person in such office, he can not act as the successor of another in the same body, on the ground that the person who has been elected to succeed the other is ineligible: *Price v. Baker, Governor*, 41 Ind. 572.

**EQUITY.**

1. A mechanic who had agreed with the owner of land to build houses thereon, was induced by fraud of the landowner and a third person, to delay the signing of the building contract until the landowner had executed and recorded a mortgage to the third person without consideration, and with the intention that the mortgagee should enter under it and oust the mechanic of his lien. By his contract the mechanic was not to be paid until the houses were completed:

*Held*, that he could maintain a bill in equity, before the houses were completed, so

restrain the assignment of the mortgage and compel its cancellation: *Hulsman v. Whitman*, 109 Mass., 411.

2. A bill in equity alleged that the plaintiff owned the westerly half of a strip of land, and the defendant the easterly half; that the plaintiff had a right of way over the whole strip, and that the defendant had built a fence across the whole width of the strip, and prayed that the maintainance of the fence might be restrained. An issue was framed to the jury, whether the plaintiff had an easement of way over the strip, and the jury found that he had not:

*Held*, that this finding concluded the plaintiff as to any easement over the defendant's half of the strip, but did not conclude him as to his title to the half claimed by him: *Warshauer v. Randall*, *Ib.*, 586.

#### ESTATES OF DECEDENTS.

1. Absence of an executor from the State after his rejection of a claim, is no excuse for the failure of a creditor to sue him within the time limited by law; otherwise it seems, if the claim has never been presented to the administrator for allowance: *Cotton v. Jones*, 37 Tex., 34.

2. An administrator *de bonis non* has nothing to do with the maladministration of the estate by the former administrator, and can not maintain a suit against the former administrator or his sureties for a *devastavit*, nor to revise the accounts of the former administrator: *Johnson v. Hogan*, *Ib.*, 77.

3. Parties interested in the distribution of an estate, as legatees, distributees, or creditors, may surcharge and falsify the accounts of an administrator by a proper proceeding instituted in the District Court of the county where the succession was opened. But an administrator *de bonis non* is not such a party: *Ib.*

4. The heirs of an intestate brought suit to recover certain property which they claimed was the separate property of their deceased father, but which was inventoried by the administrator of the estate of their deceased father as the community property of the deceased and his wife, and on a partition of the estate it was allotted the widow of the deceased, who sold it to the defendants in the suit. Defendants pleaded the order of the Probate Court confirming the partition, in bar of the plaintiff's action. Plaintiffs replied that they were never properly before the Probate Court, and therefore were not affected by its order:

*Held*, that if the plaintiff's plea was true, their remedy was by motion to the Probate Court to set aside the partition, and if it refused to do so, then they had a direct remedy by appeal: *Davis v. Wells*, *Ib.*, 606.

#### ESTOPPEL.

1. The plaintiff, who had sold a chattel to a third person on condition that it should remain the plaintiff's until paid for, and had given him a receipted bill of parcels therefor, omitting at his request any statement of the condition, told the defendant in reply to inquiry that he had sold it to the third person, and the defendant thereupon, having seen the bill from the plaintiff, bought the chattel from the third person, who had not paid the plaintiff for it:

*Held*, that in the absence of fraud, the plaintiff was not estopped to claim the chattel from the defendant: *Zutemann v. Roberts*, 109 Mass., 53.

2. The widow and administrator of A. sold to B. certain real estate of which A. was seized in fee at his death, over which ran a public street of a town. C., who owned and had erected buildings upon certain other real estate adjoining said street, was present and bid at the sale, and gave no notice of the existence of the street. B. claiming to own the ground over which the street ran, obstructed the street, to the damage of C. and the public:

*Held*, that C. was not estopped by these facts to sue for the damage so sustained by him. The existence of the public highway was, or might have been, as open to the knowledge of B. as to C.: *Foster v. Albert*, 42 Ind., 40.

#### EVIDENCE.

1. Where the defense set up to a suit on the note is that the money for which said note was given was borrowed for the illegal purpose of aiding and encouraging the rebellion, it is competent for defendant to prove a conversation between himself and plaintiff, in which defendant stated to him that he knew the money was borrowed for the purpose of aiding and encouraging the rebellion, and that he (plaintiff) did not deny this allegation: *Dixon, Adm'r, et al. v. Edwards*, 48 Ga., 142.

2. Where the issue was, whether or not the deed under which the defendant held the land failed by mistake to cover the number of feet actually sold, it was competent for a witness to testify that the lot was sold as it stood in the inclosure at the time: *Bridwell, Adm'r. et al., v. Brown, Ib.*, 179.

3. A witness whose deposition was taken out of the commonwealth refused to annex to it a document in his possession, but annexed a copy which he swore to be correct:

*Held*, that the copy was admissible in evidence: *Binnie v. Russel*, 109 Mass., 55.

4. A mere certificate by an officer having charge of public records that a fact appears by them, is not evidence of the fact: *Wayland v. Ware, Ib.*, 248.

5. At the trial of an action which presented the issue whether the defendant obtained goods from the plaintiff by fraudulent representations, and also the issue whether he obtained the goods intending at the time not to pay for them, evidence of other frauds committed by the defendant about the time of obtaining the goods and making the alleged representations is not admissible upon either issue, unless it appears that such frauds, and the obtaining of the goods in question, were parts of one fraudulent scheme, committed in pursuance of a common purpose: *Jordan v. Osgood, Ib.*, 457.

6. On the trial of an action to recover money paid in consideration of a promise of a lease, which the defendant refused to fulfill, he can not justify by proof that the plaintiff refused to pay rent, without evidence that the rent fell due before his own refusal: *White v. Wieland, Ib.*, 291.

7. In an action against a steamboat company to recover for injuries to a passenger, caused by the fall of a gangway plank leading from a wharf to defendant's boat, evidence that men working at the gangway were warned, shortly before the accident, that the plank was unsafe, is admissible, if there is evidence which would justify the jury in finding that such men were servants of the defendant: *Parker v. Boston and Hingham Steamboat Company, Ib.*, 449.

8. By failing to deny under oath the execution of a written instrument, which is foundation of a suit, and a copy of which is filed with the complaint, proof of its execution is dispensed with, but it is incumbent on the plaintiff to produce on the trial, and give in evidence, the instrument described in the complaint, to entitle him to recover: *Lucas v. Smith et al.*, 42 Ind., 103.

9. Where an instrument of writing sued on is described in the complaint as a contract to pay one hundred dollars, and the contract produced at the trial, and given in evidence, is an agreement to pay one dollar, the complaint will be considered in the Supreme Court as amended so as to conform to the proof: *Ib.*

10. Where a complaint is upon a contract described as an agreement to pay one hundred dollars, and there is no averment of any mistake as to the amount agreed to be paid, or any evidence other than the contract, and the contract in evidence is an

agreement to pay one dollar, it is error to render judgment for an amount exceeding the sum named in the contract : *Ib.*

11. Where the holder of a chose in action already matured, makes admissions and declarations against his interest in respect thereto while such holder, such admissions and declarations are competent as original evidence, against an assignee after maturity: *Sandifer v. Hoard*, 59 Ill., 246.

12. So in an action on a promissory note, by an assignee thereof, against the maker where defendant pleaded payment to the payee, while he was holder of the note, and averred the note was assigned to plaintiff after maturity; it was

*Held*, that for the purpose of showing the defense of payment, admissions and declarations of the payee made while the note was held by him, and after it was due, to the effect that it had been paid by the maker, were admissible as evidence : *Ib.*

13. The evidence was admissible on the broad ground that the declaration was, against the interest of the party making it, in the nature of a confession, and, on that account, so probably true as to justify its reception : *Ib.*

14. In a suit on the bond of a treasurer of a school board, against him and his sureties, for money received and not accounted for by him, it is not error to admit his account book, as treasurer, to show the amount of money received by him, and this too, although the entries were made by his clerk, and especially so, when the treasurer swore that there was in his hands a sum equal to that shown in his books : *Barlett et al. v. Board of Education*, 59 Ill., 364.

15. As a general rule, a party has not the right to give in rebuttal evidence which might have been given in chief; its admission is in the discretion of the Court : *Young v. Edwards*, 72 Penn., 257.

16. Evidence was offered by defendant as rebutting, which was in contradiction of evidence given by plaintiff, not being offered for that purpose, it was not error to reject it : *Ib.*

17. By articles plaintiff contracted to convey to defendant 350 acres, more or less; the land was 306 acres, and the deed was 302 acres, more or less. In an action for the purchase money, the Court charged that this deficiency was not evidence of fraud :

*Held*, to be correct. *Ib.*

18. The existence of fraud is to be proved as any other fact; the evidence is sufficient if it satisfy beyond a reasonable doubt : *Ib.*

19. A paper required to be stamped can not, under the act of Congress of July 13, 1866, be given in evidence, if unstamped : *Chartiers and Robinson Turnpike Co. v. McNamara*, 72 Penn., 278.

20. The want of a stamp is a disqualification of the paper in the hand of the delinquent to prevent its use until he pays the tax : *Ib.*

21. The exclusion of the paper as evidence, applies to State as well as Federal Courts : *Ib.*

22. The act of 1866, excluding as evidence an unstamped paper, is not a rule for regulating evidence, but is a disqualification of the instrument for want of payment of tax : *Ib.*

23. By articles of separation, the husband agreed to pay the wife a stipulated sum monthly. In a suit for her use for a payment, evidence in defense that at the execution of the agreement he allowed her to remain till a time named in his house, that she refused to leave at the end of the time, and the value of the use of the house was admissible as set-off to her allowance : *Everson v. Fry*, *Ib.*, 326.

**EXECUTOR AND ADMINISTRATOR.**

Where a judgment recovered at a special term of the Superior Court by a plaintiff for an injury to his person, is reversed at a general term of said Court, and remanded to special term for a new trial, and thereafter the plaintiff dies, no appeal lies from such reversal to the Supreme Court in favor of the administrator of the deceased: *Stout, Adm'r, v. The I. and St. L. R. R. Co.*, 41 Ind., 149.

**FRAUD.**

1. The question of fraudulent intent in the conveyance of property is a question of fact, and want of consideration for the conveyance alone will not establish such intent, as against creditors: *Parton et al. v. Yates et al.*, 41 Ind., 456.

2. Where property has been conveyed to a husband, the consideration paid therefor being the property of his wife, and a note of the husband has been given for the remaining purchase money, being one-third of the entire consideration, said note being secured by mortgage on the property conveyed, it is not fraudulent for the husband and wife, such note being still unpaid, to convey the property to a third person, and for such person to re-convey to the wife, in order to vest the title in her, she never having consented to the title being vested in her husband: *Ib.*

**FORCIBLE ENTRY AND DETAINER.**

1. When there was a trial before a jury on a warrant for forcible entry and detainer, and the entry and force by the defendant were admitted, but it was set up that the plaintiff was holding as the tenant of the defendant, and there was evidence upon both sides upon the point in the main by the parties themselves as witnesses, and the jury found for the plaintiff, under a charge of the Court telling them that the case turned upon the nature of the plaintiff's holding, whether in his own right or as tenant, and the jury found for the plaintiff, this Court will not overrule the Court below in refusing to order a new trial unless the verdict be most manifestly contrary to the evidence: *Monroe et al. v. Carter*, 48 Ga., 174.

2. A warrant for forcible entry only, which shows upon the face that the entry was more than three years before the issuing of the warrant, and which contains no allegation or charge of the forcible detainer, is demurrable as insufficient in law, and should be dismissed on motion, since the statute, in terms, provides that in no case shall the person in possession be turned out, if he has been three years in peaceable possession of the premises: *DeLagat v. Wallace, Adm'r, Ib.*, 408.

**FRAUDS—STATUTE OF.**

Where a parol contract was made in November, 1865, for the rent of a plantation for the year 1866, and the defendant went into possession of the place in pursuance of the contract, and cultivated it for the year 1866, this is such a part performance of the contract as will take it without the operation of the Statute of Frauds: *Rosser v. Harris*, 48 Ga., 512.

**GUARDIAN AND WARD.**

If a guardian purchase land, intending to receive a promissory note on other parties, from an administrator in whose hands is the estate in which his ward has a share, and to pay for the land with such note, the consideration of which is the purchase money of the same land when sold by the administrator, and he does receive the note from the administrator as the portion of the ward in said estate, and pays the whole price of the land with it, and takes the title to himself, it will so charge the land as a trust in the hands of the guardian, and his vendee who purchases

with notice of such facts, as to entitle the ward through her next friend to assert her right of election between the fund thus appropriated, and the land thus purchased and paid for: *Johnston v. Jones et al.*, 48 Ga., 554.

#### HUSBAND AND WIFE.

1. After the marriage relation has terminated, the wife may testify as to statements made during its existence in her presence to other persons, by her husband, but she may not testify to communications made to her in private by her husband: *Mercer v. Patterson*, 41 Ind., 440.

2. A man died, leaving a widow and infant daughter. The widow, in good faith entered into what she believed to be a valid marriage contract, and with her supposed husband conveyed the real estate received from her former husband to A. The infant daughter married, and with her husband, also a minor, executed a title bond to A., to convey her interest in the same property on attaining full age. The marriage of the widow was void, by reason of the prior undissolved marriage of the man with whom she supposed she had contracted marriage: Proceeding for partition of the land, said daughter and her husband being still minors:

*Held*, that the deed, executed by the widow, conveyed all her interest in the property, she being a *feme sole*, and there being no allegation of inadequacy of consideration, or that any fraud was practiced by the purchaser. The third section of the statute, 2 G. and H., 348, which declares the issue of such marriage, begotten before the discovery of the disability, to be legitimate, does not change the relation of the parties to the marriage as to each other:

*Held, also*, that the interest of the daughter was in no way affected by the title bond to convey on arriving at full age. Without regard to the question of minority, it was sufficient that, being a married woman, she could not enter into an executory contract: *Light v. Lane et al.*, *Ib.*, 539.

#### ILLEGALITY.

Where suit is instituted against trustees for advances alleged to have been made to one of the *cestui que trusts*, with the assent of the defendants for the use of the trust estate, and a general judgment is taken against the trustees, and the execution based thereon is levied upon the trust estate, the *cestui que trusts* not being parties to the execution, could not file an affidavit of illegality: *Clinch et al. v. Ferril & Wesslow et al.*, 48 Ga., 365.

#### INDORSER AND INDORSEE.

1. Two notes for value of same date, at six and twelve months, were made payable at Meadville; an Ohio bank discounted them before maturity for the payee. As to the six months' note he waived notice and demand, and on his promise to pay it at the bank, it agreed that he might take the note at any time, and it was not sent to Meadville for collection until fifteen months after maturity; the other was sent there before due and collected from the maker by suit:

*Held*, that these facts were not evidence that the note was not discounted in the usual course, or that the bank agreed to release the maker and look to the payee, or let in proof of payment by the maker to the payee, or of equities between them: *Hecking Bank v. Barton*, 72 Penn., 110.

2. The bank's title was as indorsee before maturity; it did not claim on the payee's title, and could not be affected by his subsequent declarations: *Ib.*

## INJUNCTION.

The granting, or refusal to grant, an injunction is vested by law in the discretion of the Judge of the Superior Court, to whom the application is made, and being so vested, it was manifestly intended that he should exercise that discretion on the statement of facts exhibited to him, and the Supreme Court will not interfere unless some well-established rule of law, or principle of equity, has been violated: *Jones, Drumright & Co. v. Thacher & Co. et al.*, 48 Ga., 83.

## INSURANCE.

A person can not purchase and hold for his own benefit, as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest, although a policy be issued to one who holds an insurable interest in the life, and be therefore valid in its inception, its assignment to one holding no such interest will not sustain an action in favor of the assignee upon the death of the person whose life is insured: *The Franklin Life Insurance Co. v. Hazard*, 41 Ind., 116.

## JUDGMENT.

1. Where a judgment is given in evidence, it is as conclusive in its effect as if it were specially pleaded by way of estoppel. The conclusiveness of a judgment rests not upon the doctrine of estoppel, but upon the ground that the whole community have an interest in holding the parties conclusively bound by the results of their own litigation: *Gavin et al. v. Graydon*, 41 Ind., 559.

2. The defendant is not concluded on the trial of a case by the action of the Court in reinstating it on the docket, from pleading and proving an alleged agreement and settlement, and that it was to be dismissed in pursuance of the alleged agreement, and that the entry of dismissal was, in fact, made in accordance with such contract: *Baynes v. Billups, Adm'r*, 48 Ga., 347.

3. Under section 3525 of the Code, it is necessary that the purchaser of real property should be in the possession of the same four years, before it can be discharged from the lien of a judgment against the person from whom he purchased: *Glanton Exr's, et al., v. Heard et al.*, 48 Ga., 410.

## JURY.

Where a defendant is on trial for an offense for which he will be punished by death, unless the jury shall otherwise recommend, it was not error in the Court to allow a juror to be set aside by the State for cause, upon the statement that he was conscientiously opposed to capital punishment: *Johnson v. The State*, 48 Ga., 116.

## LANDLORD AND TENANT.

1. Where a party enters upon land under a contract of purchase, the relation of landlord and tenant does not exist, and the vendee, upon failure to pay the purchase money according to his contract, can not be dispossessed as a tenant at sufferance: *Brown v. Persons*, 48 Ga., 60.

2. Where the landlord failed to repair the roof of the store-house, after notice of its leaky condition, and his tenant's goods were damaged thereby, the tenant is entitled to recoup the amount of damages as against a distress warrant for the rent: *Guthman v. Castleberry, Ib.*, 172.

## LIEN.

Where land is leased for a term of years, and the lessee places improvements thereon, and, before the expiration of the lease, sells said improvements and his interest under the lease to the lessor, taking a note in part payment therefor, the lessee is not entitled to a vendor's lien upon the land for the amount of the note: *Mitchell v. Printup*, 48 Ga., 455.

**LIMITATIONS—STATUTE OF.**

Where land was held in trust to A. for life, and at her death, to her children, and the trustee sold and made a deed, as trustee, to the whole estate, A., the life tenant entering on the deed a written consent to the making of the deed :

*Held*, that this sale by the trustee and consent by the life tenant was not such an act by the tenant for life as at common law amounted to a forfeiture, and it was error in the Court to hold that, on the making of such a deed, a right of action, based on the forfeiture, accrued to the remainder-man, and that the Statute of Limitations commenced to run : *Bazemore v. Davis*, 48 Ga., 339.

**MINOR.**

1. Under section 41 of chapter 28, of Revised Statutes, 1843, page 421, a married woman under the age of eighteen years could not, either with or without the consent of her father or guardian, release or relinquish her dower in the lands of her husband by him sold and conveyed : *Law et al. v. Long et al.*, 41 Ind., 586.

2. The deed of a minor conveying his land for a valuable consideration, is voidable, and not void, and the right to avoid it on coming of age is a personal privilege to the minor and his heirs : *Ib.*

3. The joinder of a married woman, who is also a minor, in the execution of a deed conveying the lands of her husband, not being void but voidable merely, operates to relinquish her right of dower, subject to her right of election, on arriving at full age, either to affirm or disaffirm her deed : *Ib.*

4. Where the act of an infant is executed, as where a deed is made and delivered, the infant must, on attaining full age, do some act to disaffirm the contract : *Ib.*

5. Where an infant *feme covert* has joined in a deed with her husband, conveying his real estate, she can not maintain an action to obtain an assignment of dower in the real estate so conveyed, unless her deed has been disaffirmed in some mode known to the law, before the commencement of the action : *Ib.*

6. An action may be brought to avoid a deed made by an infant *feme covert*, without paying or tendering back the purchase-money for the premises in dispute : *Ib.*

**MORTGAGE.**

1. The complaint for a foreclosure of a mortgage should so describe the premises, that, if a sale is ordered, the officer may know on what to execute the order : *Struble et ux. v. Neighbert*, 41 Ind., 344.

2. The complaint for a foreclosure of a mortgage is fatally defective where, without containing a sufficient description of the premises mortgaged, it refers to the mortgage made a part thereof, which contains no sufficient description, but itself refers therefor to another instrument : *Ib.*

**NEGLIGENCE.**

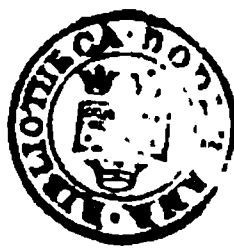
1. Action for the destruction by fire of the plaintiff's factory building, caused by sparks from the brewery of defendant. The grounds on which a recovery was claimed, were, first, that the flues, chimneys and furnaces in defendant's brewery, being near to plaintiff's factory building, were not built in proper shape, or of sufficient height or capacity, thereby causing burning coals, soot, cinders, sparks and embers to be carried therefrom upon the roof of the factory, whereby it was burned and destroyed ; and, second, that defendant was negligent in the use of the furnaces flues, and chimneys, by making large fires therein, of highly inflammable and dangerous material, so that the sparks, embers, etc., passed from the chimney to the roof of the factory, burning and destroying it. The defendant's brewery was built in a populous part of a large and rapidly increasing city. The proper

plaintiff, which was destroyed by the fire, was there at the time the brewery was constructed:

*Held*, that this imposed upon the defendant the necessity of exercising a higher degree of care and diligence in the construction and management of his brewery than if it had been located in the country, or in a part of the city where there were no houses in its immediate vicinity; that a mere difference of opinion among men of science and experience, as to the best plan to construct the chimney, furnaces and flues, did not justify the selection of only one well-supported theory without further inquiry; for the defendant was bound to use all due care and vigilance to ascertain which theory was correct, and which incorrect; and for that purpose he was bound to avail himself of all the discoveries which science and experience had put within his reach; that while the law does not require absolute scientific perfection in the construction of such works, it does require the exercise of a high degree of care and skill to ascertain, as nearly as may be, the best plan for such structures; and it requires that not only skillful and experienced workmen shall be employed in their construction, but that due skill shall be exercised by such workmen in the particular instance; that the defendant was liable in damages to the extent of the injury sustained by the plaintiff, if it was proved upon the trial, either that ordinary care and diligence were not employed in the construction of the chimneys, furnaces and flues, or that he was guilty of negligence in the management thereof, and that the factory building was destroyed from either of these causes: *Gagg et al. v. Vetter et al.*, 41 Ind., 228.

2. The question of negligence is one of mingled law and fact, to be decided as a question of law by the Court, when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed and the evidence is conflicting: *Ib.*

3. It was proper for the Court, in said action, to admit evidence to prove that smoke, sparks and flames had been seen coming out of the top of the chimney at other times than on the occasion of the injury complained of, and to instruct the jury that it was proper for them to consider and weigh such evidence in determining whether the chimney and smoke-stack had been properly constructed: *Ib.*



## RECENT AMERICAN DECISIONS.

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SUPREME COURT OF TENNESSEE—APRIL TERM, 1874.

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*MRS. E. S. WAGGONER, owner of steamboat Gallatin, et al., in error, v. PHILLIPS & ST. JOHN et al.*

AND

*MEMPHIS DRY DOCK CO. et al., v. MRS. WAGGONER, owner, etc.*

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1. The proceeding by attachment against boats to enforce liens is not a proceeding *in rem*, nor an admiralty proceeding, and does not conflict with the jurisdiction of the Federal Courts in admiralty.

FREEMAN, J., delivered the opinion of the Court.

This is a suit commenced in the city of Memphis by various parties for materials furnished and repairs done on the steamboat Gallatin, together with accounts for stores and supplies furnished, and work and labor performed for said boat, in the port of Memphis, Mrs. Waggoner, the owner, residing in Shelby county at the time of the creation of this indebtedness.

Judgment was had in favor of all but three of the plaintiffs against the defendant, from which Mrs. Waggoner appeals, and the three plaintiffs who failed to recover, to-wit: The Memphis Dry Dock Company, J. F. Frank & Co., and H. Hume, also appeal in error to this Court. Several questions, preliminary to the main question debated, are suggested and urged by Mrs. Waggoner's counsel, by way of objection to the proceeding, which we proceed to dispose of.

It appears from the record that at the return term of the attachment, the plaintiffs in the original petition for attachment filed their declaration in the usual form, to which the owner of the boat, Mrs. Waggoner, filed three pleas in abatement, one of which was to the jurisdiction of the Court, and raised the question that the matter in controversy was a cause of civil admiralty jurisdiction, of which the District Court of the United States had exclusive jurisdiction. At the same term, however, and at the same time, perhaps, a plea in bar, in the form of a general issue to the liability alleged in the declaration, was filed.

The plea in bar, by answering the plaintiff's action, overrules the denial in the plea in abatement, that the defendant was not bound to answer, and is a waiver of the matter thus pleaded: 7 Yer., 105; 9 Yer., 7.

When the case was called for trial, and before the jury were empannelled or sworn, the "defendant moved the Court to dismiss and quash the writ herein, and to dismiss this suit," which motion was overruled by the Court.

This is assigned as error in this Court, and numerous formal grounds of objection are urged to the writ, affidavit and proceedings in the case, as reasons why it should have been sustained. They are all formal, however, and such as might have been amended, if defects at all, and the rule we have repeatedly announced, as the proper practice in all such cases, that all objections by way of motion to defects in proceedings, which defects might have been amended in the Court below, must specify grounds of the objection, so as to call the attention of the counsel and

the point of the objection, or else we would not notice such objection; it can not be noticed here.

We think this rule should be adhered to, as the opposite rule enables a party to make his formal motion on the record, with no reason assigned or ground stated, and allow the same, overruled by the Court below, when, on appeal to this Court, the real objection is presented, which, if the Court below had heard, the motion would not have been overruled, or the defect might have been cured by amendment. It suffices, however, to say that the objections are not all made, or the motion rather, after issue joined, and were waived by the plea of the general issue which had been before put in by the defendant.

The leading question presented for decision in this case, on which the case must turn, is the one of jurisdiction. Have the Courts of the State jurisdiction over the subject matter in controversy, or the contracts sought to be enforced, or are they matters within the civil admiralty jurisdiction of the Courts of the United States, under Section II., Article III. of the Constitution of the United States, which extends "to all cases of admiralty and maritime jurisdiction," and is now settled to be an exclusive jurisdiction in these Courts? The proceeding is under the following sections of the Code of Tennessee: Section 1991, which provides that "any debt contracted by the master, owner, agent or consignee of any steam or keel boat, within this State, on account of any work done, or materials or articles furnished for or toward the building, repairing, fitting, furnishing or equipping such boat, or for wages due to the hands of the same, shall be a lien upon such boat, her tackle and furniture, to continue for three months from the time said work is finished, or materials furnished, or said wages fall due, and until the termination of any suit that may be brought for said debt." The mode of enforcing this lien is found in Section 3550, and succeeding sections of Article III., Chapter II., of the Code. The first of these sections provides for issuance of a warrant from a Justice of the Peace, Judge of the Circuit or Chancery Court, in the county in which the boat then is. The next provides, "the application shall be in writing, stating by whom and for what boat the debt was contracted, the items composing the debt, that it is justly due and unpaid, and demand has been made of some one of the defendants, being at the time in the county;" which petition is required to be sworn to by the petitioner or person applying for the warrant in his behalf. By Section 3553, before issuing the warrant, bond shall be taken to prosecute the suit with effect, payable to the defendant, and in case of failure to pay all costs and damages to the defendant. Section 3554 provides that the warrant shall issue in the name of the petitioners, against the owners of the boat, or some one of them, and direct the sheriff to attach the boat, tackle, etc. Section 3555 provides for a replevy of the boat on bond and security in double the amount of the debt. Section 3559 provides that where the warrant is returned before a magistrate, if the defendants do not appear at the time of trial; or when returnable into the Circuit Court, if they do not appear at the return time and plead, judgment by default shall be entered for the amount of the claims filed by all who have made themselves parties to the suit; and upon motion the Court or magistrate shall enter judgment against the sureties in the defendant's bond for the amount of the judgments and costs. If no bond has been given, the Court shall then order the boat, or such part of her furniture and tackle as may be sufficient, to be sold for the satisfaction of the judgment. These provisions are embodied in the Code, as the substance of the Act of 1833, ch. 35.

We need not go fully into the history of the admiralty jurisdiction of the District Courts of the United States in order to the settlement of the question raised on this record. It suffices to say that the gradual advance of judicial decision, by which

that jurisdiction has been immensely extended beyond the limits assigned it by the earlier decisions of the Federal Courts, is one of much interest, as illustrating the influence of the pressure of new circumstances, and real or supposed demands of the public and general good, in giving a construction to the language of a Constitution intended to define, and definitely settle the powers of the government created by it, in all probability very different from what was intended or thought of by the framers of that instrument. Up to the time of the *Genessee Chief v. Fitzhugh*, 12 H., 443, decided in 1851, the admiralty jurisdiction of the District Courts had never been held to extend beyond the waters where the tide ebbed and flowed, under the act of 1789, known as the Judiciary Act, the 9th section of which provides that the District Courts shall have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of import, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." The contest was for a length of time between the common law Courts and the Federal Courts, as to whether the latter had jurisdiction even in cases occurring on tide waters where the same were within the body of a county. This question was settled in favor of the Federal Courts—but we believe no case had before that of *Genessee Chief* ever held that the District Court had jurisdiction over cases not arising on tide water.

This doctrine, however, was overturned in that case by an able opinion delivered by Chief Justice Taney, in which he overruled all the former decisions of the Supreme Court on this question, and held that the true exposition of the 9th section of the Act of 1789, was that the jurisdiction was "made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public, and if public was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution: See 12 H. C. Ed., p. 241. He accounts for and shows in this opinion, how the Courts had been misled in their views of the extent of this jurisdiction, by adopting the English definition of a public river, as being one where the tide ebbs and flows, which he admits was a proper description of the public waters of England, because they were none of them navigable above the point where the tide reached, but holds this definition of a public river entirely too narrow to be applied to the very different circumstances of our country, where our great rivers and inland seas are navigable for the largest vessels, in some cases, for a thousand miles or more beyond the reach of the ebb and flow of the tide. There is no question now but that this jurisdiction is firmly established on grounds not to be shaken.

Without further referring to cases on this aspect of the case, we come to the question presented by this record. Is this proceeding a case where the jurisdiction is in the admiralty courts of the United States, or is it a proceeding which can properly be carried on in the Courts of our State, and over which they have rightful jurisdiction?

In the case of the *Hine v. Trevor*, 4 Wallace, 556, it was held that the grant of original admiralty jurisdiction by act of 1789 is exclusive, not only of all other Federal Courts, but of all State Courts, and that the statute of the State of Iowa, giving a remedy for marine torts, and on marine contracts, against the vessel, was unconstitutional and void. This case was one, however, of pure marine tort, being a case of collision on the Mississippi River. The reasons given by Mr. Justice Miller in that case, why the statute was void, or rather the particular features of the statute pointed out as objectionable, are important in their bearing on the validity of the present proceeding under our statute. He says, "the remedy pursued in the Iowa

Courts in the case before us, is in no sense a common law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*."

The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized on filing a petition similar in substance to a libel. That after a notice in the nature of a monitor, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued." This is said in answer to the argument that the statute of Iowa was within the clause of the Act of 1789, which "saves to suitors, in all cases, the right of a common law remedy where the common law was competent to give it." The Court, however, then goes on to distinguish this proceeding, not only from the common law remedy, by suit *in personam*, but, also, from what are called "suits by attachment." He says, p. 571, "in these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of non-residence, or some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common law Court of the State. "This may be done," he adds, "all in consistence with the grant of admiralty powers in the 9th section of the Judiciary Act." In the case of the *Moses Taylor*, 4 Wallace R., 425, a statute of California was held unconstitutional as giving admiralty jurisdiction to a State Court, which provided that the action, in the cases enumerated in the statute might be brought directly against the steamers, vessels or boats by name, and the process served on the master, mate, or any person having charge of the same, and if a judgment be recovered by the plaintiff, the boat or vessel be sold to discharge the same. This was a case of a contract for transportation of a passenger by sea from San Francisco to Panama, and was clearly a maritime contract—as said by Judge Field delivering the opinion of the Court, "it related exclusively to a service to be performed on the high seas"—and that by virtue of the contract, the liability for its performance attached both to the owner and the ship, and was an appropriate subject of admiralty jurisdiction. He then points out the distinguishing features of a proceeding in admiralty in such cases. In such a suit, the vessel is itself seized and *impleaded* as the defendant, and is judged and sentenced accordingly. The Court holds in this case, as we understand it, that the statute was void because of the fact, that it was the vessel that was proceeded against and not an action *in personam* against the owner, in which the vessel was incidentally attached, to be held subject to the satisfaction of a personal judgment to be rendered against the owner, the debtor. In other words that it was a pure proceeding *in rem*.

That this is the proper construction of the language of this opinion, is, we think, sustained by the opinion of the same Court, by Mr. Justice Clifford, in the case of *Leon v. Galceran*, 11 Wallace, 185. That was a suit by personal action, or *in personam*, against the owner of a schooner to recover mariner's wages, and to enforce and have the benefit of a lien, or "privilege" in favor of the plaintiff, given by the law of Louisiana, by virtue of a writ of sequestration, to be levied on the vessel, a proceeding very similar to our proceeding by an attachment. The Court held, that a party in such cases, might at his election either bring his suit in District Court, by a proceeding *in rem*, against the ship, or *ship and freight*, or *in personam* by libel in the same Court, or, if he choose, bring his suit in a State Court, by an action at law, or in Circuit Court of the United States, where he and his debtor are citizens of different States, as in other cases of concurrent jurisdiction between State and the Federal

Courts, and this because the common law was in such case competent to give the remedy, and it is secured to him by the saving of the judiciary act of 1789. It was insisted that the cases of *The Moses Taylor*, and *The Hine v. Trevor*, held a different doctrine, and that the Court in those cases had held that where the subject-matter of the contract was such as the District Court had jurisdiction to proceed by the Admiralty proceeding *in rem*, that a party could have no remedy in a State Court. This idea, however, is rejected by the Court, and held inconsistent with the explanations given of the grounds of those opinions, and it is laid down that they expressly recognize the right of the suitor to his common law action and remedy by attachment; See page 191. Common law remedies are not competent, says the judge, to enforce a maritime lien by a proceeding *in rem*, and consequently original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts, which is precisely what is decided in the three cases to which reference is before made, one of them, the *Belfast*, 7 Wal., 642, from which we have not quoted in this opinion.

From this explanation of the principle of these decisions, it is clear, that it is not the nature of the case, or the subject-matter thereof, that gives the exclusive jurisdiction, in the one case or the other, to the Federal or the State Court, but the nature of the remedy. That is, whether it be a proceeding *in rem*, against the vessel itself, in which the vessel is defendant, or a proceeding *in personam*, where the owner is defendant, and the vessel simply impounded by a writ of sequestration, as in Louisiana, or attachment as in our State, to answer and satisfy the personal judgment rendered against the owner or debtor, when the debt is ascertained.

While, as an original question, we might have doubts of the soundness of this principle, by which to test the question of jurisdiction in the admiralty courts, as solely dependent on the form of the remedy rather than the nature of the right to be enforced, the language of the Constitution being that the judicial power extends to all cases of admiralty and maritime jurisdiction, not to all cases of proceedings simply *in rem* against the vessel—yet, as the exposition of this power, by the only tribunal having the right authoritatively to settle it, we cheerfully follow the rule, as we understand it, thus declared.

Applying the principle above announced to the proceeding before us, in accordance with our statute, the question is, does it present the objectionable features, that are held to defeat the jurisdiction of the State Courts, and is the remedy provided such a one as the State Courts are inhibited from administering? This depends on the question, whether the proceedings contemplated by our statute, the provisions of which we have substantially quoted, are proceedings *in rem*, that is, against the boat alone, the vessel being the defendant; or whether it, on the contrary, contemplated a proceeding *in personam*, in which the owner should be defendant, and a personal judgment rendered against such owner, and an attachment fastened upon the boat to secure the property to answer, and discharge the judgment on the debt so ascertained.

This statute has been twice before this Court, first in the case of *Hill v. Mills et al.*, 9 Hum., 629, where the only question presented for decision by the Court, was, whether parties, not citizens of the State, were entitled to the remedy given by the Statute, and it was held, "that the question of domicil or citizenship was not material to the use of the remedy, but it was sufficient, if the debt was contracted here, and the boat be here." The question of jurisdiction, as between the Federal and State Courts, was not alluded to or raised in the case.

The other case, *Greenlaw et al. v. Potter*, 5 Sneed, 391, where the main question decided was, whether a liability for groceries and provisions furnished the boat by

plaintiffs, was such a debt as was provided for by the terms of the statute, and it was held that it was. It was also held that the Court did not err, in rejecting evidence offered to prove, that at the time the supplies were furnished, the boat was let under a charter party, and the charterer bound to discharge all debts contracted by or for the use of the boat during the term of his contract. Judge Turley, in the opinion, says: "This contract was a matter between the parties to the contract, with which the creditors of the boat had nothing to do."

The proceeding contemplated by the statute is against the boat. The suit, it is true, is required to be against the owners of the boat, or some one of them, by Section 4, of the Act of 1833; but this is not for the purpose of enforcing satisfaction of the debt by a judgment against them personally. It is obvious, that if this proposition is to be considered as decided, and not a mere dictum, or, in either case, is the sound exposition of the statute, then, under the decisions we have referred to, the statute is unconstitutional, as a proceeding *in rem*, and the remedy given one which the State Courts have not jurisdiction to administer. We are inclined to the view, that the expression last quoted was not absolutely necessary to the decision of the question before the Court, but waiving that, we proceed to examine the correctness of the exposition of the statutory provisions, as thus stated by the Court.

The statute, it is admitted by Judge Turley, requires that the suit be against the owners of the boat, or some one of them. It would naturally suggest itself, it seems to us, why make the owners defendants, and require the suit to be brought against them, if no debt is to be ascertained against them, and no judgment is to be rendered, on such ascertainment, against such parties defendants. The Code, however, in its provisions, seems evidently, as we think, to contemplate not only that the owner or owners should be parties, but that they should be defendants to the suit, in the precise sense in which parties are defendants in other like cases of enforcement of debts. The fourth requirement as to the statements of the petition is, "that demand has been made of some one of the defendants or of the Captain or agent of the defendants, being at the time in the county." If this is made of the defendant, required to be party by the statute, it must be an owner of the boat, for the warrant is to be issued "against the owner or owners," by Section 3554, so that he is contemplated as being in the jurisdiction at the time.

If made of the captain or agent, either as representing the owner, he will be notified of the demand, and readily inform his principal of the existence and nature of the claim. But passing from this, the section referred to, 3554, expressly requires the warrant to issue against the owners of the boat, and also shall direct the Sheriff, to attach the boat, etc. Section 3553 requires the bond for prosecution of the suit, to be payable to the defendant, that is, the owner or owners, as required to be made parties in the succeeding section. Section 3559 authorizes a judgment by default, if the defendants do not appear at the trial before the Magistrate, or in the Circuit Court, if they do not appear at the return term and plead, and then on motion the Court or Magistrate shall enter judgment on the defendant's bond (when the boat has been replevied), for the amount of the judgment and costs. If no bond has been given, the order shall be for the sale of the boat, for satisfaction of the judgment. These provisions evidently contemplate a proceeding *in personam* against the owner or owners of the boat, and a judgment against them on appearance and plea, as in other cases, or on failure to appear, by default, and when bond has been given, and boat replevied, a judgment in favor of the plaintiff on such bond against the sureties on the bond, for the amount of the judgment and costs rendered against their principal, the owner of the boat; for if a bond has been given, no judgment is to be rendered against the boat, the language being, "but if no bond has been

given the Court shall then order the boat sold," etc. We think the real object of the statute, was and is to give a suit *in personam* against the owners, making them liable for debts, such as are mentioned, contracted for their boat, and when the warrant is issued against them, it involves the idea that it should be served on them personally if to be found, as well as to attach the boat. If not served on them, then the idea of the statute is, they are brought in by service of process on their property, and this is made notice to them, and gives the Court jurisdiction to render the judgment against them, to be satisfied out of their property, by sale, in the event no bond has been given. It is true, no publication is required by the statute to give notice in this way to the owner, when not served with process, but the fact, that the boat would necessarily be in possession of the captain or master, or some other agent of the owner would be as effective means, by which such owner would receive notice of the attachment of his property, as a publication in a newspaper, and, in many cases far more effective, as publication by means of the newspaper, as a means of actual notice, is, as we know, in most cases, merely illusory. In fact, its effect is largely useful to give notice to the friends of the party whose property is attached, who reside where the suit is brought, and notice given to the real party through them.

We can see no sound or practical objection to this view of the case; and in favor of sustaining the jurisdiction of our own State tribunals to enforce contracts such as are provided for in the statute, made within our own territory, and usually with our own mechanics or tradesmen, we think we should lean rather towards that construction of our statute that will sustain the jurisdiction than defeat it.

The warrant in this case issued by the Justice, returnable to the Circuit Court, is in the name of the plaintiffs' agent, "Mrs. E. S. Waggoner, owner of the steamboat Gallatin," and claims that she is indebted to plaintiffs, etc., and commands the Sheriff to attach the boat. It is defective, we think, in not commanding also the Sheriff to summon the said debtor, if to be found, as we think this was by fair construction the purpose of the statute, but defendants had waived any defects of service or want of command of this kind in the writ by appearing, replevying the property, and pleading to the declaration filed in the cause. This declaration is against the owner, in the usual form, claiming that she owes the plaintiffs the amount of the accounts referred to in the petition for the warrant, for supplies furnished the steamboat Gallatin. In this view of the proceeding given by the statute, it is not a proceeding *in rem*, in which the vessel is defendant, but one *in personam*, in which the boat is held by attachment to answer and discharge the personal judgment to be rendered against the defendant owner, and therefore is not, under the principles laid down in the cases we have cited, in violation of the Constitution of the United States, nor such a proceeding as belongs exclusively to the jurisdiction of the District Courts of the United States.

This case it is proper to add, was tried by a jury on the issue joined between the parties, who returned a verdict for a portion of the plaintiffs, and a regular judgment rendered in pursuance of the views expressed in this opinion. A replevin bond having been executed by the owner, judgment was also regularly entered on motion for the amount of the judgment against the sureties on said bond.

We have thought it proper to give the construction of the statute on this question, in order to settle the question of conflict between the two jurisdictions, in this proceeding, under the late decisions of the Supreme Court of the United States, presenting principles different from what prevailed, at the time of the passage of the Act of 1833, and when the two decisions of our own Court were made.

The jurisdiction of the State Courts could be maintained, however, in this case, so far as all the matters in controversy, except the claim of Frank & Co., on a dif-

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We have thought it proper to give the construction of the statute on this question, in order to settle the question of conflict between the two jurisdictions, in this proceeding, under the late decisions of the Supreme Court of the United States, presenting principles different from what prevailed, at the time of the passage of the Act of 1833, and when the two decisions of our own Court were made.

The jurisdiction of the State Courts could be maintained, however, in this case, so far as all the matters in controversy, except the claim of Frank & Co., on a dif-

ferent principle, growing out of the fact that the port of Memphis was the home port of the steamer at the time of making the contract.

The rule laid down by the Supreme Court on this subject is thus stated by Mr. Justice Clifford, in the case of the *Belfast*, as to maritime liens, he says, "Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the States, under the decisions of this Court, to create such liens as their Legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement; but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by proceeding *in rem* is exclusive in the District Courts of the United States, as provided in 9th section of Judiciary Act. See also, the *General Smith*, 4 W., 438; 1 Black, 529.

The case of Frank & Co., was a case of affreightment, and failure to deliver articles shipped on board the boat. This case not being one embraced in the provisions of the statute, the jury were properly instructed to find against it, as the law did not authorize a recovery under this proceeding on such a claim. On the trial of the case the Court refused to allow proof of the claim of the Memphis Dry Dock Company, and of H. Hume, because the items of the account were not set out in the petition for writ of attachment, as required by the statute.

The declaration, however, had charged the indebtedness for the amount due, and defendant without objection to the defect in the writ, had taken issue on the allegations of the declaration, and we think his Honor erred in refusing the usual proof of the indebtedness in the usual way on the trial. For this error the case will be reversed and remanded as to these two plaintiffs, for a new trial. The judgment will be affirmed as to the other parties.

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IN CHANCERY AT NASHVILLE, TENN.— ——— TERM, 1874.

*T. H. ATKIESON et al. v. W. L. MURFREE et al.*

1. A sale of land, made by the Master, is not complete and binding upon the purchaser until confirmation: *Owen v. Owen*, 5 Hum., 352; *Graves v. Keaton*, 3 Cold., 8; *Wood v. Morgan*, 4 Hum., 372; *Jones v. Walkup*, 5 Sneed, 135; *Moore, ex parte*, 3 Head, 171; *Rogers v. Clark*, 1 Sneed, 665; *Armstrong v. McClure*, 4 Heisk., 80.
2. And it is the duty of the Court, while securing the rights of the successful litigants, to see that the property be sold for the best price that can be had: *Childress v. Hurt*, 2 Swan, 487; *Johnson v. Quarles*, 4 Cold., 615.
3. It is allowable, therefore, to open the biddings alone upon the offer of a higher price, if the advance be so considerable as to furnish a sufficient inducement, under all the circumstances, to a resale of the property: *Coffin v. Corruth*, 1 Cold., 194; *Newland v. Gaines*, 1 Heisk., 723; *Aubrey v. Denny*, 2 Moll., 508; 2 Dan. Ch. Pr., 1285.
4. The advance which ought to be deemed sufficient to require the biddings to be opened, must be left to depend in some measure on the circumstances of the given case. An advance of sixteen hundred dollars is clearly sufficient.
5. The better practice, upon opening the biddings, is to authorize the Master, upon notice in the usual way, to receive bids for a limited time, commencing with the advance offered, the bidders to be required to make payments, and give notes as of the date of the original sale, and otherwise to comply with the terms and requirements of that sale, and the highest bidder at the end of that time to be the purchaser.

In this suit, brought for the purpose of foreclosing a trust deed made for the benefit of creditors and winding up an insolvent estate, a house and lot in Nashville were sold by the Master, under order of the Court, at public sale, and bid off by a purchaser at \$8,900, who has complied with the terms of sale by executing his notes, with good security, for the purchase money, as required by the decree of sale. The cause is before me upon the proposition of a third person to advance the bid to \$10,500, or about 18 per cent., bond, with good security, being executed to the Clerk and Master, in the penalty of \$15,000, conditioned to start the biddings if re-opened, at the price of advance offered. The purchaser at the Master's sale appears by his counsel and resists the application, and the questions involved have been ably argued.

The argument against the opening of the biddings starts out with the assumption that the authorities, in this State, are uniform, that something more is required than a mere advance on the price bid to justify the opening of the biddings in Chancery sales. For this position the counsel cites *Owen v. Owen*, 5 H., 352; *Donaldson v. Young*, 7 H., 266; *Morton v. Sloan*, 11 H., 280; *Childress v. Hurt*, 2 Swan, 490; *Johnson v. Quarles*, 4 Cold., 615; and *Newland v. Gaines*, 1 Heisk., 720. And he might have added *Houston v. Aycock*, 5 Sn., 406, and other cases. But an examination of these, and other authorities in this State, shows that the decisions and *dicta* are far from uniform, and that our Courts have been reluctant to lay down the rule that a mere advance was sufficient, while they have often seized upon slight circumstances, of an intangible and unsatisfactory character, in connection with the advance, to do what the manifest equity of the case demanded, and re-open the biddings. In the conflict of authority and *dicta* to be found in our own books upon the precise point now before me, the safest course seems to be to ascertain the principles which underlie the actual decisions, and follow them.

In England, the uniform ruling of the Court of Chancery has been that the bidder before the Master acquires no right in the property until the sale has been confirmed. In other words, there is no binding contract of sale until the Court has, by confirming the Master's report, accepted the bid. The consequence is that until confirmation the bidder assumes no risk. If the property be destroyed by fire, or is deteriorated in value by any other casualty, the loss does not fall upon him; so, he has the right until confirmation to find out whether there has been any misrepresentations made in regard to the property, or whether there are any flaws in the title. As a counterpoise to these advantages, the Court, for the benefit of its suitors, considered itself at liberty to receive advances on the bid, and to open the biddings if the advance would justify the act. The amount of advance necessary to accomplish this result has been fluctuating, and, perhaps, has never been rigidly fixed, either in gross or in per centage, by a positive rule to be applied to every case. The rule has been flexible and varied with the circumstances. Ten per cent. was at one time considered to be a proper minimum, but five per cent. has been received. The sum of £40 seems to have been recognized as the minimum in any case: 2 Dan. Ch. Pr., 1285; 1. Sug. Vend., 163.

In Ireland, a deposit of five per cent. advance and the payment of former purchaser's costs, will always open biddings, provided the total advance amounts to £40: *Aubrey v. Denny*, 2 Moll., 508; *Leland v. Griffith*, 2 Moll., 510.

Chancellor Kent, *clarum et venerabile nomen*, at an early day, laid down the rule which seems to have been adhered to in New York, that, at a Master's sale, a binding contract is made as soon as the hammer is down, and that the purchaser is at once entitled to all the rights which are conceded in England only after confirmation. The consequence of this rule, carried to its logical result, is, that from the

moment the hammer of the auctioneer falls, all the risks of ownership follow, and that, as the property becomes the purchaser's, the circumstances necessary to open the biddings must be such as would afford good ground for equitable relief in contracts between individuals. Mr. Hoffman, in his *Practice of Masters in Chancery*, page 224, does not hesitate to condemn the reasoning upon which the conclusion is sought to be based, and it does not seem to have been adopted to its full extent by the Courts of other States of the Union. Our own Court has expressly repudiated it: *Owen v. Owen*, 5 H., 352; *Morton v. Sloan*, 11 H., 278; *Childress v. Hurt*, 2 Swan, 487.

There is no conflict in our authorities, so far as sales of land are concerned, that the sale is not complete or binding on the purchaser until confirmation. There is some conflict on this point in regard to sales of personalty, the usage in this State having been to deliver the property at the time of sale: *Polk v. Pledge*, 5 Cold., 384; *Newman v. Sloan*, 5 Cold., 390; *Graves v. Keaton*, 3 Cold., 8. But the latest decision relating to sales of personalty seems to restore the symmetry of the law, and makes the title depend on confirmation: *Johnson v. Johnson*, 2 Heisk., 521.

As a result of the rule in regard to sales of realty, it has been held that a purchaser may be released from his purchase, where the value of the property has been depreciated by the destruction of buildings by fire between the sale and confirmation: *Graves v. Keaton*, 3 Cold., 8. So, in *Wood v. Morgan*, 4 H., 372, a tender of money, for the redemption of real estate, sold under decree of the Chancery Court, made before the sale was confirmed, was held to be premature. The purchaser, too, is entitled to rent only from confirmation: *Armstrong v. McClure*, 4 Heisk., 80. And a sale of the realty of an infant or married woman, does not work a conversion until confirmation: *Jones vs. Walkup*, 5 Sneed, 135; *Moore, ex parte*, 3 Head, 171; *Rogers v. Clark*, 1 Sneed, 665.

Under these circumstances, the remark of McKinney, J., in *Childress v. Hurt*, 2 Swan, 491, seems to be well warranted: "The course of decision on this subject has conformed rather to the English practice than to that of some of the American Courts," referring especially to Chancellor Kent's views, 4 Kent Com., 192. This language is repeated with approbation by the Court in *Eakin & Co. v. Herbert*, 4 Cold., 119. The logical deduction from these premises drawn by Judge McKinney, in continuation of the remark just quoted, seems to follow, of course: "The principle being admitted, he says, that a sale by a master is not complete, nor binding on the purchaser till confirmation of the report, the conclusion is easily arrived at, that, as it is equally the object and duty of the Court to see not merely that the sale is properly conducted, but also that the property shall be sold for the best price that can be had, it is allowable to open the biddings alone upon the ground of the offer of a higher price, if the advance be so considerable as to furnish a sufficient inducement, under all the circumstances, to a resale of the property. See also *Coffin v. Corruth*, 1 Cold., 194; *Lassell v. Powell*, 7 Cold., 282; *Newland v. Gaines*, 1 Heisk., 724.

Upon principle, there can be no doubt of the correctness of the conclusion thus reached, and the weight of *dicta* and decision in this State is to the same effect. The rulings to the contrary are manifestly in conflict with the premises universally conceded in all of our cases.

If, now, we consider the policy of the different lines of decisions, the intolerable hardships of the one as evidenced in the case of *Houston v. Aycock*, 5 Sneed, 406, and the beneficial workings of the other as illustrated in *Childress v. Hurt*, 2 Swan, 491, must be obvious to every intelligent observer. The Courts can not ignore the fact that their suitors, whose property is compelled be sold under decree, labor under

many disadvantages in obtaining a fair price for their, it may be, and often is, little all. The sales are frequently in *invitum*, when the parties are at a distance, and in no condition to find purchasers. They are required to be made, at times, when property is universally depressed. It is the duty of the Courts, under these circumstances, while securing the rights of the successful litigant, to "see that the property shall be sold for the best price that can be had." As a general rule, too, it is to the interest of opposing litigants that the property should sell for the best price. A bidder who, as we have seen, runs no risk whatever until the sale is confirmed, can have little right to complain if the advance is such as to make it inequitable to confirm, and he is released without loss, and with his necessary costs and expenses paid. Nor do I think that such sales will be injuriously affected by the knowledge that the bidder may not get the property at his bid, if it be known, at the same time, that the biddings will only be opened upon a substantial advance, that a resale will be promptly made, and that the bidder will have the opportunity of again bidding before the sale is finally confirmed.

"With respect," says McKinney, J., 2 Swan, 491, "to the advance which ought to be deemed sufficient to require that the biddings should be opened, this must be left to depend, in some measure, on the circumstances of the given case." The English minimum is manifestly too high for our State. Land in England is a commodity in which none but the wealthy can indulge, and the cost of all judicial proceedings, even the opening of biddings at a Master's sale, are heavy. In this State, on the other hand, land is comparatively cheap, and a commodity in which all may deal, and it is the policy of our institutions to keep it in the hands of the many. If a minimum is to be fixed at all, it ought, necessarily, to be far below the English standard. The Irish rule is much more appropriate to our condition of society. It is not necessary, for me, in this case, to fix a minimum, nor to express an opinion as to what it should be. It is enough for me to say that an advance of sixteen hundred dollars is sufficient to render it "inequitable to confirm the sale," and to authorize the opening of the biddings.

It remains to be considered in what form the Clerk and Master should be directed to receive new bids, and resell the property. The practice of the Court has not been uniform on this subject. In some Chancery Districts, and notably in this District, the practice has been to make a general order of resale, and for the Master, after the usual advertisement, to again offer the property at public vendue, starting at the advance. The extension of the credit resulting from this course, is an evil of which creditors, and other persons interested in the fund, have a right to complain, the notes given for the purchase money being dated as of the resale. A better usage, more in accord with the English practice, prevails in other Districts. By this plan, the biddings are ordered to be kept open by the Master for a specified time, say twenty or thirty days, to receive bids, notice of the fact being given in the usual way. The highest bidder, at the end of this time, will be required to give notes with good security as of the date of the first sale, and otherwise to comply with the terms and requirements of that sale. In this mode all the benefits of opening the biddings will be obtained, without affecting the rights of creditors, or other persons entitled to the proceeds of sale. The decree will be framed accordingly.

W. F. COOPER, Chancellor.

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N. B.—Since writing the foregoing, I have been advised of a recent decision of the Supreme Court of the State at Knoxville, in the case of *Click v. Burris*, to the effect that biddings may be opened upon a mere increased bid, and that an advance of ten per cent. on the previous offer is sufficient for this purpose. Whether a less offer might not, in some cases, justify the opening of the biddings is properly left undetermined.

W. F. C.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.—AUGUST 31, 1874.

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*PHILIP G. GALPIN v. LUCY B. PAGE.*

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Presumptions of law in favor of the acts of Courts of general jurisdiction; their extent and limitations.

FIELD, J., delivered the opinion of the Court.

The material questions presented for consideration in this case have already been determined by the recent decision of the Supreme Court of the United States. It is unnecessary, therefore, to repeat at large the facts of the case; they are given in the report of the decision in 18th Wallace. It will be sufficient to state here its general features. The action is ejectment for the possession of certain real property situated within the city of San Francisco, both parties derailing title from the same source, Franklin C. Gray, deceased, who died in the city of New York in July, 1853, intestate, seized of the premises in controversy. The plaintiff claims through conveyances executed by direction of the Probate Court of the city and county of San Francisco, which administered upon the estate of the deceased. The defendant claims under a purchaser at a commissioner's sale, had under a decree of a District Court of the State, having jurisdiction in that city and county, rendered in a suit brought to settle the affairs of alleged co-partnerships between the deceased and others. The case turns upon the validity of this decree and the commissioner's sale had under it.

The suit in which that decree was rendered was one into which two suits, brought by different parties, had been consolidated. One of them was brought in 1854, by William H. Gray, a brother of the deceased; the other was brought in 1855 by Cornelius J. Eaton, who had been at one time a clerk of the deceased. Each of these complainants alleged a separate, distinct, and dormant co-partnership between himself and the deceased, which embraced the commercial business in which the latter was engaged and all his real estate transactions. Gray alleged that his interest in the business and property of the co-partnership formed between him and the deceased was one-third. Eaton claimed that his interest in the business and property of the co-partnership formed with him was one-fourth. Each of these complainants, alleging an universal and dormant co-partnership between himself and the deceased, denied, one of them under oath, any co-partnership of the deceased with the other. Subsequently, however, they consented to a consolidation of their suits; and four days afterwards, a decree was entered, and it would seem from the certificate of the Judge appended to the decree, that it was by consent of the parties, adjudging that each had been a co-partner with the deceased as alleged by him, and that both of these co-partnerships, dormant and unknown to each other as they were, embraced all the property and all the business of the deceased.

By the decree a reference was ordered to a commissioner to take an account of the business, profits and property of the two co-partnerships, with directions, upon the confirmation of his report, to sell all the property, real and personal, of both co-partnerships, and to execute proper conveyances to the purchasers. At the sale which

subsequently took place, one of the attorneys of the complainant Gray became a purchaser of the premises in controversy. He afterwards conveyed an undivided half to his law partner, and devised the other undivided half to the defendant. His law partner some years later transferred his interest also to the defendant.

The deceased, Franklin C. Gray, left surviving him a widow, Matilda C. Gray, of whom a posthumous child was born in December following, named Franklina C. Gray. By the law of California the estate of the deceased vested in the widow and child in equal shares; and they both were made parties to the suits of Gray and Eaton; in the first suit the child being made a party by a supplemental bill. Both were non-residents of the State of California and residents of the State of New York; and their absence from this State and residence in New York were averred in the pleadings. Constructive service upon them, by publication under the statute was, therefore, attempted. The widow appeared; and upon representation that service had been made upon the infant, a guardian *ad litem* was appointed for her, and he consented to the consolidation of the two suits and, it would seem, to the decree rendered.

Subsequently, upon appeal to the Supreme Court of the State, the decree of the District Court in the consolidated suit was reversed, on the ground that no sufficient service of summons had been made upon the infant Franklina in the case brought by Eaton; and that, until such service, no guardian *ad litem* could be appointed for her; and on the additional ground that the evidence presented had not established a co-partnership between William H. Gray, and the deceased. The case was, accordingly, remanded to the District Court; and subsequently, the two suits, after being on the calendar for trial for nearly a year, were dismissed. The plaintiff acquired his interest and brought the present action after this dismissal.

When the case was originally here, the Circuit Court decided that the record in the suits of Gray and Eaton, in the District Court, did not show that due service of summons by publication had not been made upon the infant Franklina, and as the District Court was a superior court of general jurisdiction, it must be presumed to have had jurisdiction of the subject-matter, and of the parties in those suits; and that, in consequence, the sale and conveyance under the decree, notwithstanding its subsequent reversal on the grounds stated, passed a good title to the purchaser; the Court holding that, where a record of a judgment of a superior court of general jurisdiction was assailed collaterally, it was not enough that the record did not affirmatively show jurisdiction, but that it must affirmatively show that the Court did not have jurisdiction, or its judgment would be valid until reversed on appeal or vacated in some direct proceeding taken for that purpose. And so the Court said that "at the time of the sale, a purchaser was entitled to rely upon the validity of the decree (in the consolidated suit), unless it affirmatively appeared on the face of the record that the Court had no jurisdiction of the infant."

But the Supreme Court of the United States, took a different view of the case, and held that the adjudication of the Supreme Court of the State, that no sufficient service of summons was ever made upon the infant Franklina, and that until service no guardian *ad litem* could be appointed for her, was an adjudication that the jurisdiction of the District Court over her had never attached and that this adjudication was conclusive and binding upon the Circuit Court and every other Court, when brought before it for consideration. Into its soundness the Circuit Court could not look; for it possessed no revisory power over the decisions of the Supreme Court of the State. The adjudication constituted the law of that case, and settled, for all possible controversies, the character of the District Court. Rendered without jurisdiction, that the decree was always void, so far as it affected the rights of

the infant Franklina, and unavailing to support any proceedings under it affecting her title.

But the Supreme Court of the United States in its decision went still further, and held that the rule stated by the Circuit Court, as to the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction, was subject to many exceptions and qualifications, and had no application to the case at bar; that such presumptions were limited to jurisdiction over persons within the territorial limits of the Courts, persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common law. In these latter particulars, the decision was in affirmation of doctrines asserted by the Circuit Court in an elaborate and carefully considered opinion, delivered in 1865, in the case of *Gray v. Larimore*, which grew out of the sale under the same decree of the District Court which is now before us. The doctrines there asserted were followed in the subsequent case of *Gray v. Murphy* and, until the decision of this case by the present Circuit Judge, were not regarded as open to contestation in the Circuit Court. In this case they were overruled by him upon the supposed obligation of the Court to follow a decision of the Supreme Court of the State in *Hahn v. Kelly*, rendered in 1868 (34 Cal., 391). And to that case, frequent reference has been made by counsel on the present trial, and some of its positions have been pressed with great earnestness, as though they were decisive of the points now under consideration. That case was cited to the Supreme Court of the United States. Extracts from the opinion in the case constituted the principal argument before that Court of one of the counsel of the defendants; and if its positions were not expressly mentioned in the opinion of that Court, it was not because they had not been carefully considered.

That case was brought to quiet the title to a tract of land in Alameda County, and to restrain its sale. The plaintiff asserted to the premises by virtue of a sale under a judgment recovered for the deficiency remaining of a mortgage debt, after application of the proceeds received upon a sale of the property mortgaged. The suit in which the mortgage was foreclosed, and judgment for the deficiency rendered, was prosecuted without personal service upon the defendant, upon publication of summons; and the validity of the judgment was assailed upon the alleged ground that the attempted service of the summons by publication was defective and void. The decree however recited that it appeared to the Court that the summons and complaint had been "duly served on the defendants according to law and the order of the Judge of the Court;" and the Supreme Court of the State held that this recital was a just adjudication upon the point, and was as conclusive upon the parties as any other fact decided, provided it did not affirmatively appear, from other portions of the record, that the recital was untrue. As there was no direct contradiction of the recital, and as no other objection than the one mentioned was taken, this ruling, as to the effect of the recital, disposed of the case and necessitated a reversal of the decree below. The Court, however, in its opinion, did not confine its consideration to this point, but proceeded to lay down certain general rules as to the presumptions of jurisdiction attendant upon the judgments of superior courts of general jurisdiction, and to declare what constitutes the record in this State of such judgments, and the conditions upon which they may be collaterally assailed. Among other things, it asserted in substance, and so far as anything in an opinion can be deemed an adjudication, which is not necessary to the decision, it adjudged:

1st. That a judgment of a court of general jurisdiction could not be attacked collaterally, except for matters apparent upon its record; that it was not necessary that the jurisdiction of the court should affirmatively appear upon the record, but

that, in the absence from the record of matters affirmatively disclosing a want of jurisdiction, either over the subject-matter of the action or the person of the defendant, such jurisdiction would be conclusively presumed; and that this conclusive presumption prevailed in all cases without reference to the character of the proceedings, or the residence of the parties against whom they were taken.

2d. That in this State such record of the court consists only of the papers and proceedings which compose what is designated in the Code of Procedure as the judgment roll; and, where jurisdiction is exercised over persons without the territorial limits of the court by constructive service upon them by publication of summons and judgment by default is rendered upon such service, the record need not contain certain material proceedings, without which jurisdiction can not attach, or any recital or evidence of such proceedings, because the Legislature has not directed such proceedings to be incorporated into the so-called judgment roll.

We do not regard the case at bar as one where any collateral attack is made upon a judgment of a superior court of general jurisdiction. The decree in the consolidated suit of Gray and Eaton is not here attacked collaterally in any proper meaning of that term. The adjudication of the appellate Court in the same case upon the character of that decree is not offered by way of collateral attack; it is the exhibition of the result of a direct proceeding with reference to that decree had on appeal. When we speak of a collateral attack, we refer to the presentation of grounds of invalidity, other than those which have been established by the prosecution of a writ of error, or an appeal, or some other direct proceeding to vacate the judgment. We will nevertheless examine the positions advanced by the Supreme Court of the State, in the case named.

Before proceeding, however, to this examination, it is proper to say a few words respecting the light in which the ruling of the State Court in that case is to be regarded in this Court, and the right of this Court to look into the jurisdiction of a State Court when its judgment is produced in evidence.

In the first place, the ruling of the State Court in *Hahn v. Kelly*, except so far as it gives a construction to the statute of the State, is not binding upon this Court. In all that relates to the presumptions which attend the acts of the superior courts and the circumstances under which they may be assailed, it stands like the ruling of any other court, entitled to respect and consideration for the learning and ability of its members, but possessing no obligatory force. "Where private rights," says the Supreme Court of the United States, in *Chicago City v. Robbins*, 2 Black, 429, "are to be determined by the application of common law rules alone, this Court (and the same is true of the Circuit Court,) though entertaining for State tribunals the highest respect, does not feel bound by their decision." "It is undoubtedly true in general," says the same Court in another case, (*Alcott v. Supervisors*, 16 Wall., 687,) "that this Court does follow the decisions of the highest Courts of the States, respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind, that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitutions or statutes of a State which the Federal Courts adopt as rules for their own judgments." The ruling of the State Court in *Hahn v. Kelly*, except so far as it gives a construction to the State statute, relates to matters of general law, and not to questions of a local character peculiar only to the State. If the ruling of the Court be correct, it applies not merely to judgments of the superior courts of general jurisdiction existing in California, but to the judgments of such courts existing in all other States.

In the second place, whilst the Courts of the United States are not foreign Courts

in their relation to the State Courts, they are Courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State Courts only the same faith and credit which the Courts of another State are bound to give to them. And it is well settled, that neither the constitutional requirement, providing that "full faith and credit shall be given to the public acts, records and judicial proceedings of every other State," nor the Act of Congress providing for the mode of authenticating such acts, records and proceedings, (May 26, 1790,) and declaring "that when thus authenticated, they shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the Courts of the State from which the records are or shall be taken," precludes an inquiry into the jurisdiction of the Court in which the judgment was given, or the right of the State to exercise authority over the parties, or the subject-matter of the judgment. As was said in *Christmas v. Russell*, 5 Wall., 305, the judgments of the Courts of one State are not foreign judgments in another State under the Constitution and Act of Congress, nor are they domestic judgments in every sense; because they are not the proper foundation of final process, except in the State where they were rendered; and they are open to inquiry as to the jurisdiction of the Court and notice to the defendant.

The Act of Congress goes, perhaps, further than the Constitutional requirement which relates to the faith and credit to be given in each State to the public acts, records and judicial proceeding of every other State, inasmuch as it declares the effect of the records and judicial proceedings of the States when authenticated, as provided "*in every Court within the United States*," thus making its provisions applicable to the Federal Courts as well as to the Courts of the States. The power of Congress to prescribe the manner in which the records of the States shall be proved in the National Courts, and the effect which shall be given to them, is independent of the Constitutional provision. Still the law is to have the same construction in its application to the National Courts as to the State Courts. It leaves untouched the general principle, that the jurisdiction of every court is open to inquiry, when produced in the courts of another sovereignty.

The Circuit Court of the United States for the District of California has the same authority to examine into the jurisdiction of a State Court of California, when its judgment is produced, as the Circuit Court of the United States for the District of New York has, when the same judgment is produced before that tribunal. All the Circuit Courts of the United States have the same relation to the State Courts; and each will take notice of and administer, in proper case, the laws of the States. This Court, for example, will take notice of, and, in a proper case, administer the law of New York, just as it will take notice of and administer the law of this State. In all cases the jurisdiction of a State Court may be inquired into; but the inquiry can proceed no further; the jurisdiction existing, the merits of the controversy involved are not open to examination.

We recur now to the rulings in *Hahn v. Kelly*. The first position, that when a judgment of a court of general jurisdiction is produced in evidence, it can only be collaterally attacked for matters apparent upon its record, and that, in the absence of such matters, the jurisdiction of the Court must be conclusively presumed, is, with certain qualifications and exceptions, undoubtedly correct. These qualifications and exceptions arise where the proceedings of the parties against whom they are taken are without the ordinary jurisdiction of the Court, and can only be brought within it by pursuing special statutory provisions. As we had occasion to observe in a previous case, "All courts, even such as are designated courts of superior or general authority, are more or less limited in their jurisdiction; they are limited to a partic-

ular kind of cases, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as may arise upon the high seas; or to the use of particular process in the enforcement of their judgments:" *Norton v. Meader*. When we speak of a court of general jurisdiction in civil cases, we do not mean one which has jurisdiction over all subjects, and all persons, and of all process; but we mean one which exercises a general jurisdiction, in law or equity, according to the well-established principles known to those departments of jurisprudence, over subjects and persons within certain defined territorial limits. When a judgment of such a court is produced, relating to a matter falling within the general scope of its powers, the jurisdiction of the Court will be presumed, even in the absence of the formal proceedings or steps by which the jurisdiction was obtained; and such jurisdiction can not ordinarily be assailed, except on writ of error or appeal, or by some other direct proceeding. But when the judgment of such a Court relates to a matter not falling within the general scope of its powers, and the authority of the Court over the subject can only be exercised in a prescribed manner, not according to the course of the common law; or the judgment is against a party without the territorial limits of the Court, who was not served within those limits, and did not appear to the action, no such presumption of jurisdiction can arise. The judgment, being as to its subject-matter or persons, out of its ordinary jurisdiction, authority for its rendition must appear upon the face of its record. In other words, there is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised. This doctrine is an obvious deduction from principle, and is sustained by adjudged cases almost without number, in the highest Courts of the several States, and in the Supreme Court of the United States. There is running all through the reports the emphatic declaration of the common law courts, that a special authority, conferred even upon a court of general jurisdiction, which is exercised in a mode different from the course of the common law, must be strictly pursued, and the record must disclose the jurisdiction of the Court. On this subject the cases speak a uniform language, with scarcely a dissentient voice.

The tribunals of one State have no jurisdiction, and can have none, over persons or property without its territorial limits. Their authority is necessarily circumscribed by the limits of the sovereignty creating them. Any exertion of authority beyond those limits would be deemed, as stated in *D'Arcy v. Ketchum*, 11 How., 174, in every other forum, an illegitimate assumption of power, and be resisted as mere abuse.

But over property and persons within those limits the authority of the State is supreme, except as restrained by the Federal Constitution. When, therefore, property thus situated is held by parties resident without the State, or absent from it, and thus beyond the reach of the process of its Courts, the admitted jurisdiction of the State over the property would be defeated, if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, in lieu of personal service, is allowed by statute in nearly all the States, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. In this State, the statute, in terms, allows a constructed or substituted service in all cases, whether upon contract or for torts, where the person on whom the service is to be made is a non-resident of the State or is

absent from it, whether the action be directed against property within the State, or merely for the recovery of a personal judgment against the defendant. But so far as the statute authorizes, upon such substituted service, a personal judgment against a non-resident, except as a means of reaching property situated at the time within the State, or affecting some interest therein, or determining the status of the plaintiff with respect to such non-resident, it can not be sustained as a legitimate exercise of legislative power. A pure personal judgment, not used as a means of reaching property at the time, in the State, or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the State, not having been personally served within its limits, and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the State, as to the liability of a party over whose person and property they had no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the State is brought under the control of the Court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the State.

Aliens at peace with the United States, are allowed access to the Courts of the States, and unless the statute be limited in its application as stated, we must accept the conclusion that personal judgments for torts by one alien against another, neither of whom has ever been within our borders, may be recovered without personal service, by publication, and subsequently enforced against any property belonging to the defendant, that may, by chance, be brought into the country. It would, certainly, be a strange application of the statute if an inhabitant of Asia could recover in that way in our Courts a personal judgment for an alleged tort committed against him in his own country by one of his countrymen.

An attachment of the property of a non-resident is allowed by the law of this State in all actions upon contracts, express or implied. This remedy, with the ordinary power of a court of equity to enforce mortgages and other liens, and to take property into its custody where there is danger of its removal beyond the State or of being wasted, and the information imparted to third parties by filing a notice of *lis pendens*, where an interest in real property is the subject of the litigation, affords sufficient protection to citizens of the State without the assumption of any territorial jurisdiction over non-residents. Be this as it may, any such assumption can find no support in any principle of natural justice or constitutional law.

"Where a party is within a territory," says Mr. Justice Story, in *Picquet v. Swan*, 5 Mason, 43, "he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and can not have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*. . . . The principles of the common law (which are never to be lost sight of in the construction of our own statutes), proceed yet further. In general, it may be said, that they authorize no judgment against a party, until after his appearance in Court. He may be taken on a *capias*, and brought into Court, or distrained by attachment and other process against his property to compel his appearance, and for non-appear-

ance be outlawed. But still, even though a subject, and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice and regular personal appearance in Court."

"Jurisdiction is acquired," says the Supreme Court in *Boswell's Lessee v. Otis* 9 Howard, 348, "in one of two modes, first, as against the person of the defendant by the service of the process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by attachment or a bill in chancery. It must be substantially a proceeding *in rem*."

A substituted service is usually made in the form of a notice published in the public journals, as in this State. "But such notice," says Cooley (p. 404), in his treatise on Constitutional Limitations, "is restricted in its legal effect, and can not be made available for all purposes. It will enable the Court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the Court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and, therefore, under the control of the State, but the notice can not be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another State or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served, is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there, but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

In *Cooper v. Reynolds*, 10 Wall., 308, similar doctrines are laid down by the Supreme Court of the United States. In that case, the plaintiff had sued the defendants in Tennessee for false imprisonment, and upon affidavit that none of them were to be found in his county, sued out a writ of attachment against their property. Publication was ordered by the Court, notifying them to appear and plead, answer or demur, or that the suit would be taken as confessed, and proceeded in *ex parte* as to them. Publication was had, and the defendants having made default, judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession, the original owner brought ejectment for the premises. In considering the character of the attachment suit, the Court, speaking through Mr. Justice Miller, said: "Its essential purpose or nature is to establish, by the judgment of the Court, a demand against the defendant, and to subject his property, lying within the territorial jurisdiction of the Court, to the payment of that demand."

"But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and can not be served with any process by which he can be brought personally within the power of the Court. For this difficulty the State has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to

appear, and that thereafter the Court may proceed in the case, whether he appears or not.

"If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the Court, to answer any demand which may be established against the defendant by the final judgment of the Court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the Court may find to be due to the plaintiff.

"That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions. First, the judgment of the Court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same Court or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the Court, in such a suit, can not proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the Court of further jurisdiction, though the publication may have been duly made and proven in Court."

The writer of the present opinion thought some of the objections taken to the preliminary proceedings in the attachment suit referred to were well founded, and dissented from the judgment of the Court; but, in the doctrine laid down in the above citation, he always has concurred. It is, in our judgment, the true doctrine, and the only doctrine which is consistent with any just protection to the citizens of other States. Such is the constant intercourse between citizens of different States at the present time, that the greatest insecurity to property would exist, if purely personal judgments obtained *ex parte*, without personal citation, upon mere publication of notice, which, in the great majority of cases, would never be seen by the parties interested, could be made available for the seizure of property afterwards brought within the State. That law would be intolerable, if valid, which would permit citizens of another State to come into this State and recover personal judgments for all sorts of torts and contracts, upon mere service by publication against citizens of different States, who have never been within the State or possessed any property therein. If such judgments could be upheld, they would become the frequent instruments of fraud in the hands of the unscrupulous, and be sprung on the property of the unsuspecting defendants when the transactions giving rise to the judgments have passed from their memory, or the evidence respecting the transactions has perished. We do not think it within the competency of the Legislature to invest its tribunals with authority having any such reach and force; certainly no presumption in favor of their jurisdiction can arise when a judgment of this character is produced against a non-resident who has never been within the State, and did not appear to the action: Hare & Wallace's Notes to Smith's Leading Cases, vol. 1, p. 838; *Picquet v. Swan*, 5 Mason, 535; *Monroe v. Douglass*, 4 Sand. Ch., 182.<sup>1</sup>

<sup>1</sup> In *Oakley v. Aspinwall*, 4th Comstock, 520, Mr. Chief Justice Bronson, in delivering the opinion of the Court of Appeals of New York, said: "When the Courts of any State render a judgment against one who was not a citizen of that State and was not brought into Court, the judgment is held absolutely void everywhere else, although it may have been expressly authorized by the Legislature of the State where it was rendered. I doubt whether such a judgment is of any force in the State where it was rendered. Under our form of Govern-

The second position laid down in *Hahn v. Kelly*, requires us to consider what papers and proceedings constitute the record of a Court of general jurisdiction, which may be looked into when a judgment of that Court, rendered against a person without the territorial limits of the Court, upon constructive service by publication, is assailed collaterally for want of jurisdiction. In that case, it is held that such record consists only of the papers and proceedings which compose what is designated in the Code of Procedure as the judgment roll, and that it need not contain the affidavit of the party and the order of the Court, without which constructive service of the summons by publication can not be made.

The statute authorizing constructive service by publication of summons upon non-resident and absent parties, requires certain facts to be presented by affidavit to the Court in which the action is pending, or to a Judge thereof, or to a County Judge. If it appear upon such presentation, to the satisfaction of the Court or Judge, that the facts exist, an order may be made for the publication of the summons, and such order must prescribe the period and designate the paper in which the publication is to be made, and if the residence of the defendant be known, the order must also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to him at his place of residence. The service of the summons is deemed complete at the expiration of the time prescribed by the order for publication.

The statute, in the same title which treats of the manner of commencing civil actions, after stating the manner in which service shall be made in case of personal service, and in case of service by publication, provides in sections almost immediately following, that "Proof of the service of summons shall be as follows: 1. If served by the sheriff, his certificate thereof. 2. If served by any other person, his affidavit thereof. 3. In case of publication, the affidavit of the printer or his foreman, or principal clerk, showing the same; and on an affidavit of a deposit of a copy of the summons in the post office, if the same has been deposited."

In another part of the same statute, in a different title and chapter, treating of a different subject, "the manner of giving and entering judgment," it is provided that immediately after entering the judgment, in case the complaint be not answered, the clerk shall attach together the summons with the affidavit or proof of service, and the complaint with a memorandum endorsed thereon, that the default of the defendant in not answering was entered and a copy of the judgment; and that these papers shall constitute the judgment-roll in the case.

Now, it is evident that the language of the statute in the first title mentioned, declaring what shall be proof of service of the summons, must be limited to the action of the persons making the service or publication, of which the sections immediately

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ment it is questionable, to say the least, whether the Legislature can, in any case, without an express license from the people, authorize a judgment which shall operate *in personam* against a defendant who neither appeared nor was in any way served with process. That State must not boast of its civilization, nor of its progress in the principles of civil liberty, where the Legislature has power to provide that a man may be condemned unheard."

In *Webster v. Reid* 11 How., 459, it appeared that the Legislature of the Territory of Iowa had directed that suits might be instituted against the owners of half-breed lands lying in Lee County in that Territory, and notice be given to the owners through the Iowa Territorial Gazette. Suits having been instituted by notice in that way, and judgments recovered, the Supreme Court of the United States declared that they were nullities. "These suits," said Mr. Justice McLean, in delivering the opinion of the Court, "were not a proceeding *in rem*, against the land, but were *in personam* against the owners of it. Whether they all resided within the Territory or not, does not appear; nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice nor an attachment or other proceeding against the land, until after the judgments. The judgments therefore, are nullities, and did not authorize the executions on which the land was sold."

preceding in the same title speak, as if the language were as follows: "Proof of the service of summons by the sheriff or other person, or by a publisher of a newspaper, as above provided, shall be as follows." The obvious meaning intended is, that the proof of service, which the parties performing the particular duty prescribed must furnish, shall be the certificate or affidavit designated. It does not mean that such certificate or affidavit shall be all that is required on the subject of service, but only all that is required of those particular persons. Any other construction would lead to this absurd result, that an affidavit could be used to establish conclusively a fact to which it makes no reference. Publication of a summons in a newspaper is not service of the summons, nor is an affidavit of such publication proof of service. The publication, to be of any avail, must be in a paper designated, and for the period prescribed, by the order of the court or judge. The terms of such order must therefore be connected with the affidavit or the proof will amount to nothing. The affidavit by itself is only a portion of the proof, a solitary link in the chain required. The printer is not supposed to know anything of the order, and is not called upon even to refer to it in his affidavit.

When, therefore, the record of the judgment comes to be made up, it must necessarily include the order of the Court, or it will disclose no proof of service. And when the statute requires the clerk to attach, with other papers, the proof of service, it means not merely the affidavit which the publisher may furnish as part of such proof, but the order also without which the affidavit establishes nothing. It is in giving to the provision, declaring the proof which the officer or person making personal service, or the printer publishing the summons, shall furnish of their acts, the effect of a declaration that no other proof of the service was necessary, that error in our judgment was committed in *Hahn v. Kelly*.

That the ruling in that case left the judgment-roll a defective and imperfect record, seems to have been felt by the Court, for it says: "In our judgment it would have added to the completeness of the record to have made the proof of service by publication, include, also, the affidavit of the party, and the order of the Court directing publication to be made, for, in point of law, they constitute a part of the mode; but the Legislature has not seen proper to do so, and we can no more add to their will than we can take from it."

For the reasons we have stated, we do not admit that the statute sanctions any such defective record; but, on the contrary, we are clear that, properly construed, it requires full proof of the jurisdictional facts to be incorporated into the judgment-roll.

If however, we are mistaken, and the order, which is the foundation of and the only authority for the publication, is no part of such roll, or, if not mistaken, we are bound to accept as correct the construction of the statute given by the State Court, then inquiry into the jurisdiction of the Court can not be limited, on a collateral attack, to the contents of the roll. The remaining record of the proceedings would be of equal authority and verity, and could be equally relied upon. The record at common law, which imported absolute verity, was a history of all the acts and proceedings in the action, from its initiation to final judgment, enrolled upon parchment for a perpetual memorial and testimony. These rolls were called records of the Court, and were, in the language of Blackstone, "of such high and supereminent authority, that their truth was not to be called in question." A record, professedly embracing only a portion of such acts and proceedings, can not be entitled to similar implicit credit, and can not equally close the door against collateral attack. The use of the same designation to indicate a different collection of acts and proceedings, can not, of course, carry with it the same import. If the Legis-

lature should declare that only that portion of the proceedings in an action, which constitutes the judgment itself, should be enrolled, it would not be any less illogical to insist that to that enrollment parties should be confined when questioning the jurisdiction of the Court, than it is that they shall be confined to any other defective record of the proceedings in the action.

When constructive service by publication in a personal action is authorized by statute in place of personal citation, the rule prevailing in all courts is, that the statute must be strictly pursued. We are not aware that this doctrine has been denied in any State Court. It has been repeatedly asserted by the Supreme Court of this State in the most emphatic manner. "A contrary course," said that Court in *Jordau v. Giblin*, in 1859, "would encourage fraud and lead to oppression:" 12 Cal., 100. "A failure to carry out the rule thus prescribed," said the Court, speaking through Mr. Justice Sanderson, in *Ricketson v. Richardson*, 26 Cal., 149, "in any particular is fatal where it is not cured by an appearance." In *Forbes v. Hyde*, 31 Cal., 342, decided in 1866, the same doctrine is recognized. There the objection to the insufficiency of an affidavit made to obtain an order of publication, was allowed on a collateral attack to the judgment under which the plaintiff claimed title in ejectment. As the statute only requires certain facts to appear by affidavit *to the satisfaction of the Court or judge*, we should be inclined in the absence of this decision to hold that defects in the affidavit could be taken advantage of only on appeal, and could not be urged collaterally. We cite the case, however, not only because it reiterates the rule of strict construction, but because of the special reason it gives for its enforcement in this State, in the observation that there is probably, "no State in which so many have waited and are still waiting for their adversaries to depart in order that suit may be brought and judgment obtained against them on publication without actual notice." "It may be important," continues Mr. Justice Sawyer in delivering the unanimous opinion of the Court, "to the interests of those who suppose they have acquired rights under this class of judgments, that they should be upheld. But it is equally important that the interests of parties who have only been constructively served with process, and who, in many instances, have had no actual notice till they have been condemned unheard, should be protected. If a judgment is void for want of jurisdiction, all those who have acquired interests under it, have done so in full view of the condition of the record; while, on the other hand, a defendant is liable to have an unjust judgment rendered against him without any knowledge of the pendency of the action till it is too late to protect himself. An appeal is no adequate remedy where a party has no notice; for the time to appeal is very brief, and may expire before actual notice is obtained. In the language of the Court in *Smith v. Rice*, 11 Mass., 512, 'the very grievance complained of is that the party had no notice of the pending of the cause, and of course no opportunity to appeal.'"

Now, if the rule in *Hahn v. Kelly* be correct, we have this singular result: that whilst the statute must be strictly followed before jurisdiction can be acquired over the person, a party against whom a judgment is rendered is precluded from examining the proceedings, by which alone it can be seen whether the statute has been followed. In other words, the Court says, no jurisdiction is acquired by the Court if the requirements of the statute be not pursued, but the record of the proceedings taken shall always be a closed book.

If the order of the Court is no part of the judgment-roll, it can not be brought before the Court on appeal, unless a statement or bill of exceptions be made up; and either of those proceedings supposes the presence of the parties or counsel. If any other direct proceedings are taken they might result in vacating the judgment;

but under the ruling in the case cited, the record being regular on its face, the purchaser, if a third party, would be protected, and the wronged defendant be left to the doubtful chances of recovering the value of his property by action against the plaintiff.

From the examination we have thus been able to give to the case of *Hahn v. Kelly*, we do not find in it sufficient reasons to depart from the old and well-established rules formerly recognized in the Supreme Court of the State, the observance of which, as we are more and more impressed every day, is essential to the protection of the rights of all citizens, whether resident or non-resident of the State.

The proceedings for constructive service by publication, which the statute authorizes, are, as stated by Mr. Justice Sanderson in the case of *Ricketson v. Richardson*, "in derogation of the common law;" that is, they are not in accordance with the course of the common law.

It was the boast of that law that it condemned no one in his person or his property without his day in Court. That there must be citation before hearing, and hearing, or opportunity of being heard, before judgment, was a cardinal proceeding which pervaded all its judicial proceedings. And when the articles of compact contained in the Ordinance of 1787, for the government of the North-west Territory, declared that its inhabitants should always be entitled "to judicial proceedings according to the course of the common law," it was believed by them that they had in that guarantee the assurance of full protection to all their private rights; and that the language was not used "mainly for ornamental purposes," having a certain "rotundity of sound which is pleasing to the ear" but leaving "no definite impression upon the understanding:" *Hahn v. Kelly*, 34 Cal., 411. The common law recognized no such proceeding as a personal judgment without the appearance of the party, and probably in no other case than *Hahn v. Kelly* were proceedings to outlawry ever cited as a mode "amounting or equivalent to constructive service," by which a common law court obtained jurisdiction. "By the strict rules of the common law," says the Supreme Court of New Jersey in *Hess v. Cole*, 3 Zab., 116, "it was necessary in every suit, not only that the defendant should be served with process, but that his appearance to the action should be effected. Every student is familiar with the cumbrous machinery and complicated process by which the Courts sought to compel the *appearance* of the defendant. He is familiar also with the principle that if the defendant was contumacious and refused to appear to a mere civil action, the proceedings were at an end. No judgment could be rendered. Every common law record shows upon its face that the defendant was either in custody, or was summoned or attached to answer to the action. And, however inconvenient may have been the strictness with which the principle was applied, and the extent to which it was enforced in ancient common law proceedings, the principle itself is by no means peculiar to the common law. It pervades, in fact, every code of law and every well-regulated system for the administration of justice."

The opinion in *Hahn v. Kelly* is not only singular in its reference to proceedings

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<sup>1</sup> In speaking of these terms—"proceeding according to the course of the common law"—the Court in *Hahn v. Kelly* uses this language: "Some words are used to express ideas, and others to ornament them. The more we turn this expression over and examine it by the light of reason, for the purpose of determining to what use it has been put, the more we are inclined to the opinion that it has been used merely from force of habit, or mainly for ornamental purposes. It has a certain rotundity of sound which is quite pleasing to the ear, but leaves no definite impression upon the understanding. It is simply equivalent to a knowing look or a solemn shake of the head, and doubtless it was first used in that sense. When first employed, its use was harmless, for there was then no mode of procedure except such as the common law prescribed, but its continued use where the modes of the common law have been superceded is mischievous."

to outlawry for want of appearance of a party; but the citations from Blackstone to show that the Courts of Chancery would proceed to judgment upon a constructive service of process at all analogous to service by publication, establish nothing of the kind; and only seem to do so because they are detached from their context in the volume. They relate to proceedings to compel the appearance of parties *after service of the subpoena*, which is the original process in chancery, as any one will see who will read the whole page in Blackstone from which the citations are taken.

Service of the subpoena could indeed be made by leaving a copy at the actual residence of the defendant, as well as by delivering a copy to him personally. And in special cases where an absent or absconding defendant had appointed a person to act as his agent in the matter litigated, substituted service upon such agent in lieu of the principal, was, upon application to the Court, sometimes allowed: Adams's Equity, 324; *Hobhouse v. Courtney*, 12 Simons, 130. But it was not until the statute of 5th George II., c. 25, that proceedings could be taken by publication, without service in one of the modes indicated. That statute authorized proceedings by proclamation published in the London Gazette, and read in the parish church and posted in the Royal Exchange, where a defendant had absconded to avoid service. It did not apply to a citizen or subject of another government who had never been in the realm.

Passing from *Hahn v. Kelly*, we proceed to consider the other positions taken by the defendant to defeat a recovery. It is contended by her counsel: 1. That the cases of Gray and Eaton were suits *in rem*, and that the decree in the consolidated suit bound the property without reference to the defective service of summons upon the infant. 2. That the District Court had authority to appoint a guardian *ad litem* for the infant without previous service upon her; and, 3. That the decree in the consolidated suit was not reversed as to the widow Matilda.

1. Suits *in rem* may be divided into four classes: 1. Those which are directed primarily against particular property, and are intended to dispose of it without reference to the title of the individual claimants. 2. Those which are instituted to determine the *status* of particular property or persons. 3. Those which are in form personal suits, but which seek to subject property brought by existing lien or by attachment, or some collateral proceeding under the control of the Court, so as to give effect to the rights of the parties; and, 4. Those which seek to dispose of property or relate to some interest therein, but which touch the property or interest only through the judgment recovered. Proceedings in admiralty for the forfeiture of a vessel or goods are instances of the first kind; the suit is there brought against the vessel or goods directly, without reference to the rights of persons, and all parties are notified to appear by a designated day and assert their claims, or the property will be condemned. Proceedings in the Probate Court upon the validity of a will are instances of the second kind; the judgment when rendered operating directly upon the *status* or condition of the instrument determining its validity or invalidity. Proceedings by attachment against the property of debtors, or to foreclose a mortgage, or other lien upon property, or to partition real estate, are instances of the third kind. Proceedings to compel the execution or cancellation of a conveyance of real property in the State, and proceedings to wind up and dispose of partnership property, are instances of the fourth kind. The third and fourth classes mentioned are not strictly proceedings *in rem*; but so far as they affect property in the State they are treated as substantially such proceedings.

In proceedings *in rem* notice of some kind is required, but as all property is supposed to be in the possession of its owner, either in person or by agent, a seizure of property is, of itself, considered to impart notice of the proceeding to the owner.

Therefore, where the property is at the outset, taken into the custody of the Court, law is less strict in requiring further notice, either generally by proclamation to all persons, or specially to the reputed owner. But where the property to be affected is not thus at the outset taken into custody, there is no constructive notice given by the proceeding; and the same notice as provided by law, must be given to the defendant, as in actions where a personal judgment for damages is alone sought. "A proceeding," says the Supreme Court of Vermont in *Woodruff v. Taylor*, 20 Vermont, 65, where the law on the subject of suits *in rem* is stated with great clearness, "professing to determine the right of property where no notice actual or constructive is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It will be a mere arbitrary edict, not to be regarded anywhere as the judgment of a Court."

The suits of Gray and Eaton were partly *in personam*, and were at the same time, intended to subject property in the State to the disposition of the Court; but as the property was not taken into custody at the outset, there was no constructive notice given to the owners or claimants by the proceeding, and the absent and non-resident defendants could only be brought before the Court by publication of summons, as provided by statute, and this, as the Supreme Court held, was never done, so far as the infant Franklina was concerned.

2. As to the authority of the District Court to appoint a guardian *ad litem* for the infant without previous service upon her, it is sufficient to observe that the Supreme Court of the State on appeal decided that no such authority existed. The statute requires service of summons on all infants, before a guardian *ad litem* can be appointed, and makes no difference in this respect between an infant of a few months and one nearly attaining its majority, and the service can no more be dispensed with in the one case than in the other. Besides, there is wisdom in the provision requiring service even upon an infant in its cradle, for the papers, through its nurse or relatives, would almost be sure in such case to find their way into hands of parties who would look after the interests of the child. Be this as it may, it is the proceeding required by the Legislature before the jurisdiction of the Court can attach; and as Chief Justice Taney said of a mere formal objection which was insisted upon in the Supreme Court, nothing is unimportant or to be disregarded which the Legislature has prescribed as a condition for exercising the jurisdiction of the Court. Where personal service can not be made by reason of the non-residence in the State or absence of the infant, service must be made by publication as in other cases. Such publication is the prescribed condition to the exercise of jurisdiction over the infant.

3. The objection that the decree of the District Court in the consolidated action was not reversed as to the widow Matilda, is not founded upon fact. There was but one decree, though the Court speaks in its opinion as though there were two separate decrees before it. This is an evident inadvertence in the language of the Court, arising from the fact that the objections to the validity of the decree were taken to the separate proceedings had before their consolidation. The case was remanded for further proceedings; and on filing the remittitur, the question evidently arose as to what proceedings should be had, and after hearing counsel for the parties, the Court ordered a new trial on all the issues as to all the parties. Upon this order the case remained on the calendar of the District Court for trial for over a year, and was then dismissed. The order of dismissal was entered in the consolidated suit, and it would appear for greater caution in the separate suits also.

The decree as to the infant Franklina being void for want of jurisdiction in the District Court over her, all proceedings founded upon such decree, so far as her

rights are concerned, necessarily partake of the same infirmity. The purchaser of the premises being one of the attorneys of the plaintiff Gray, the law, as held by the Supreme Court, imputes to him knowledge of the defects in the proceedings which were taken under his direction and that of his partners. The conveyance of the undivided half to his law partner was made after the reversal of the decree, and the latter also took his interest with similar knowledge of the defect. Independently of this fact, their title fell with the reversal of the decree. On this subject we can add nothing to what was said in the opinion of the Supreme Court, except that the doctrine of *Reynolds v. Harris* was reaffirmed in the late case of *Reynolds v. Hosmer*, reported in 45 California, 617.

As to the claim for rents, we are of opinion that the cost of filling up the waterlot, which was a valuable and permanent improvement, is a just offset to the rents received or which might have been received by the defendant.

It follows from the views we have expressed that the plaintiff is entitled to judgment for the possession of the premises; and such judgment will be entered upon the findings filed—with costs.

## NOTES.

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### THE LEGAL ASPECTS OF THE BEECHER SCANDAL.

We have hitherto refrained from saying anything on this topic, mainly because we thought too much was already being said. We have all along intended when the church committee should have completed their labors and made their report, to remark upon the trial and its lessons in a purely legal light, and without expressing any definite opinion as to the guilt or innocence of the great preacher. It may, however, be difficult to disguise our views on this point in the progress of our remarks, and we therefore wish to disclaim beforehand any intention to obtrude those views, for that is outside the province of a legal journal. But we are not ashamed of our opinion, and do not propose to apologize for it, but only to explain its possible utterance.

In the first place, we deem it extremely unfortunate that one of the most important legal investigations that ever took place in this country should have been conducted without any of the powers, sanctions or responsibilities of a court of justice—unfortunate for the parties to the investigation, unfortunate for the public, unfortunate for the cause of decency, morality and religion. We have heretofore taken pains to express our unfavorable opinion of ecclesiastical councils. The conduct of the Brooklyn council does not tend to change our views. We regret that Mr. Beecher, instead of demanding a trial by Plymouth Church, did not seek one before a jury of Kings county. The result is inconclusive and unsatisfactory, although we do not say that it may not be right. As the opinion of a committee of very excellent gentlemen, it is entitled to respect, but it carries no authoritative weight. It may satisfy Plymouth Church, but it will not satisfy the public. The object of such an inquiry should be the elucidation of truth. For such a purpose an ecclesiastical tribunal is practically powerless. Lawyers do not need that we should enlarge on the reasons of this patent fact. It is enough that we merely suggest them. The principal reasons are three: First, such a tribunal possesses no power to compel witnesses to attend; second, it possesses no power to extract evidence from such witnesses as choose to come before it; and third, there is no penalty for perjury if such witnesses shall disregard the truth. The whole machinery is extra-judicial, and as impotent as a women's sewing society, or a moot-court of school boys. There is only one fitting place for such an investigation, and that is a court of justice, and until a court of justice passes upon this matter, Mr. Beecher's friends will find that the snake of scandal is scotched, not killed, and Mr. Tilton's friends, if he has any, will find that he has convinced no one but his friends. We do not know that there is any law against the holding of such ecclesiastical trials, but the law of common sense ought to prohibit them, and we sincerely hope that this is the last one that will ever take place in this country, at least in respect to a man whose name and reputation have been so dear and so useful to the cause of Christianity as those of Henry Ward Beecher. If a deacon is accused of having lost his temper and indulged in audible profanity, or if a sister is charged with having played "old maid" with cards, or worn ear-rings, or kept time with her carnal limbs to the music of a secular violin, we do not object to an ecclesiastical court sitting in judgment on these offenses. But when the greatest preacher since Peter the Hermit is accused of the most loathsome and detestable crime made against any Christian minister within

our recollection, and which if substantiated, would prove the greatest blow that the cause of religion has ever suffered in this country, we think it but fair that some other tribunal than a committee of the preacher's own church and nomination should be charged with the investigation. This is a national affair, and not merely an affair of Plymouth Church. That church had a right to have this investigation, to conduct it as they have done, and to be satisfied with the judgment arrived at, but they must not, nor must Mr. Beecher expect a unanimous acceptance by the public.

Thus far we have considered this matter only with respect to the power of the tribunal to elucidate the truth, and we conclude that in this respect it is a futile inquiry. There is another reason why such investigations before such tribunals should not be encouraged, even if tolerated, and that is the debasing effect of the discussion in the newspapers of the merits of the controversy, contemporaneously with its progress. For a period of two months every newspaper in the United States has daily or weekly taken sides in this matter, and brought all the powers of trained intellect and experienced writers to bear in support of their respective favorites. Such a state of things was never known in respect to a trial in a court of justice, and can not fail to exercise a prejudicial effect, if not on the judges themselves, yet on the public mind. There is, of course, no help for this. If a murder trial were going on, and the daily papers in the city of New York should, during its progress, advocate the one side or the other, and throw their editorials into the jury room, the court would see to it very quickly. But in respect to the Brooklyn inquiry, thanks to the press, every man and woman in the land had made up their mind before the committee reported, and their opinion was not in the least influenced by the report when it was promulgated. In other words, here was a trial by newspaper. The report of the committee was of small consequence. We dare say comparatively few have read the report, but everybody has read some newspaper on the subject. Public opinion in regard to this affair is of prime importance. Indeed, it is only in deference to public opinion that the investigation was had. But public opinion is formed not by the adjudication of the tribunal, but by the comments of a number of individuals who write for newspapers. This is unfair to the accuser and to the accused. It is a defeat of the very object of judicial inquiry. It is in itself a sufficient reason why ecclesiastical trials at this day can never have any weight beyond the particular church by which they are conducted.

So much for ecclesiastical trials in general. Now, in regard to this trial in particular. In a legal view, how contemptible it is! The highly respectable committee come together and announce that they are ready to hear from anybody who knows or has heard anything on the subject of investigation. Now commences a shower of "statements." The accuser comes forward and reads a long and carefully prepared statement, which he has gone through the idle form of swearing to before a notary or commissioner of deeds beforehand. In it he states everything he knows or doesn't know; everything he has heard, dreamed, suspected, feared, inferred, told, read or written, with one or two things he claims to have seen. Rhetorical, effusive, sentimental, vague, violent, irrelevant, in nine parts out of ten. The most pointed thing in it was that Mrs. Tilton had once made a "statement" in writing to him that she and Mr. Beecher were guilty, but he did not happen to have that statement about him. He gives copious extracts from letters, but declines to produce the originals! Then the witness was "cross-examined." As naturally might be expected, when the witness was pinched, he squirmed, became indignant and refused to answer. The committee were not there to try him, but to try the other man. He threatened the committee, and promised that if they did not mind what they were about, it should

absent from it, whether the action be directed against property within the State, or merely for the recovery of a personal judgment against the defendant. But so far as the statute authorizes, upon such substituted service, a personal judgment against a non-resident, except as a means of reaching property situated at the time within the State, or affecting some interest therein, or determining the status of the plaintiff with respect to such non-resident, it can not be sustained as a legitimate exercise of legislative power. A pure personal judgment, not used as a means of reaching property at the time, in the State, or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the State, not having been personally served within its limits, and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the State, as to the liability of a party over whose person and property they had no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the State is brought under the control of the Court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the State.

Aliens at peace with the United States, are allowed access to the Courts of the States, and unless the statute be limited in its application as stated, we must accept the conclusion that personal judgments for torts by one alien against another, neither of whom has ever been within our borders, may be recovered without personal service, by publication, and subsequently enforced against any property belonging to the defendant, that may, by chance, be brought into the country. It would, certainly, be a strange application of the statute if an inhabitant of Asia could recover in that way in our Courts a personal judgment for an alleged tort committed against him in his own country by one of his countrymen.

An attachment of the property of a non-resident is allowed by the law of this State in all actions upon contracts, express or implied. This remedy, with the ordinary power of a court of equity to enforce mortgages and other liens, and to take property into its custody where there is danger of its removal beyond the State or of being wasted, and the information imparted to third parties by filing a notice of *lis pendens*, where an interest in real property is the subject of the litigation, affords sufficient protection to citizens of the State without the assumption of any territorial jurisdiction over non-residents. Be this as it may, any such assumption can find no support in any principle of natural justice or constitutional law.

"Where a party is within a territory," says Mr. Justice Story, in *Picquet v. Swan*, 5 Mason, 43, "he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and can not have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*. . . . The principles of the common law (which are never to be lost sight of in the construction of our own statutes), proceed yet further. In general, it may be said, that they authorize no judgment against a party, until after his appearance in Court. He may be taken on a *capias*, and brought into Court, or distrained by attachment and other process against his property to compel his appearance, and for non-appear-

ance be outlawed. But still, even though a subject, and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice and regular personal appearance in Court."

"Jurisdiction is acquired," says the Supreme Court in *Boswell's Lessee v. Otis* 9 Howard, 348, "in one of two modes, first, as against the person of the defendant by the service of the process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by attachment or a bill in chancery. It must be substantially a proceeding *in rem*."

A substituted service is usually made in the form of a notice published in the public journals, as in this State. "But such notice," says Cooley (p. 404), in his treatise on Constitutional Limitations, "is restricted in its legal effect, and can not be made available for all purposes. It will enable the Court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the Court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and, therefore, under the control of the State, but the notice can not be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another State or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served, is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there, but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

In *Cooper v. Reynolds*, 10 Wall., 308, similar doctrines are laid down by the Supreme Court of the United States. In that case, the plaintiff had sued the defendants in Tennessee for false imprisonment, and upon affidavit that none of them were to be found in his county, sued out a writ of attachment against their property. Publication was ordered by the Court, notifying them to appear and plead, answer or demur, or that the suit would be taken as confessed, and proceeded in *ex parte* as to them. Publication was had, and the defendants having made default, judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession, the original owner brought ejectment for the premises. In considering the character of the attachment suit, the Court, speaking through Mr. Justice Miller, said: "Its essential purpose or nature is to establish, by the judgment of the Court, a demand against the defendant, and to subject his property, lying within the territorial jurisdiction of the Court, to the payment of that demand."

"But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and can not be served with any process by which he can be brought personally within the power of the Court. For this difficulty the State has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to

appear, and that thereafter the Court may proceed in the case, whether he appears or not.

"If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the Court, to answer any demand which may be established against the defendant by the final judgment of the Court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the Court may find to be due to the plaintiff.

"That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions. First, the judgment of the Court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same Court or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the Court, in such a suit, can not proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the Court of further jurisdiction, though the publication may have been duly made and proven in Court."

The writer of the present opinion thought some of the objections taken to the preliminary proceedings in the attachment suit referred to were well founded, and dissented from the judgment of the Court; but, in the doctrine laid down in the above citation, he always has concurred. It is, in our judgment, the true doctrine, and the only doctrine which is consistent with any just protection to the citizens of other States. Such is the constant intercourse between citizens of different States at the present time, that the greatest insecurity to property would exist, if purely personal judgments obtained *ex parte*, without personal citation, upon mere publication of notice, which, in the great majority of cases, would never be seen by the parties interested, could be made available for the seizure of property afterwards brought within the State. That law would be intolerable, if valid, which would permit citizens of another State to come into this State and recover personal judgments for all sorts of torts and contracts, upon mere service by publication against citizens of different States, who have never been within the State or possessed any property therein. If such judgments could be upheld, they would become the frequent instruments of fraud in the hands of the unscrupulous, and be sprung on the property of the unsuspecting defendants when the transactions giving rise to the judgments have passed from their memory, or the evidence respecting the transactions has perished. We do not think it within the competency of the Legislature to invest its tribunals with authority having any such reach and force; certainly no presumption in favor of their jurisdiction can arise when a judgment of this character is produced against a non-resident who has never been within the State, and did not appear to the action: *Hare & Wallace's Notes to Smith's Leading Cases*, vol. 1, p. 838; *Picquet v. Swan*, 5 Mason, 535; *Monroe v. Douglass*, 4 Sand. Ch., 182.<sup>1</sup>

<sup>1</sup> In *Oakley v. Aspinwall*, 4th Comstock, 520, Mr. Chief Justice Bronson, in delivering the opinion of the Court of Appeals of New York, said: "When the Courts of any State render a judgment against one who was not a citizen of that State and was not brought into Court, the judgment is held absolutely void everywhere else, although it may have been expressly authorized by the Legislature of the State where it was rendered. I doubt whether such a judgment is of any force in the State where it was rendered. Under our form of Govern-

required under the provisions of the treaty. Such surrenders, moreover, have been made not as of right, but by international comity, and only in the cases of individuals who have committed crimes against what may be called the laws of nature—that is to say, against those laws which all nations consider the foundation of their security and well-being, both public and private. Political offenders have never been surrendered under any pretext, and even where, for the purpose of carrying out a political end, a foreigner has been guilty of offenses which would come within the category of crimes against the ordinary laws, this country has always refused their surrender. At the present time, the surrender of offenders to most of the foreign governments is regulated by treaty or convention. The treaty which practically regulates the mutual extradition of offenders with France was entered into in 1852, and has been confirmed in this country by an Act of Parliament, which regulates the mode in which its provisions shall be enforced. Under the terms of this treaty alone, the surrender of offenders against the law of France can take place; and it is to this, therefore, that we must look to see if Bazaine could be surrendered.

The first article of that treaty effectually disposes of the second point raised, namely, whether a convicted person can be surrendered. It is there provided that the contracting parties “shall deliver up to each other reciprocally such persons, except native subjects or citizens of the party upon whom the requisition may be made, who, being convicted or accused of any of the crimes hereinafter specified, committed within the jurisdiction of the requiring party, shall be found within the territories of the other.” Hence it is plain that if Bazaine were either convicted or accused of any crime specified in the treaty he could be surrendered by the British government. If it were not for the express words of the treaty itself it might be argued, that upon the construction of this first article nothing would prevent extradition for offenses other than those specified in the treaty. The treaty, however, goes on to provide (Art. II.) that the “surrender shall be made on account of the following crimes, which, however differently denominated in the respective legislatures, are punishable under both with grave penalties;” then follows a long list of offenses. Article VII. provides that “no accused or convicted person who may be surrendered shall in any case be proceeded against or punished on account of any political offense committed prior to his being surrendered, nor for any crime or offense not described in the present convention which he may have committed previously to his having been surrendered.” Hence only such crimes as are named in the treaty are extradition crimes. Bazaine was tried and convicted for a military offense, which was substantially that of surrendering without sufficient reason, a fortress into the hands of the enemy in time of war, and whilst he was in command of adequate forces and means for defending the same. No such offense is named in the list of crimes given in the treaty, and, therefore, no surrender could or would be made by the British government. The answer then to the first question discussed is that the offense for which Bazaine was tried and convicted was not such an offense as would, under the treaty, justify his surrender, and if he can not be surrendered under the treaty he can not be surrendered at all.

But let us consider the question from another point of view, and suppose that no treaty exists. What would then be the answer of our government to a requisition for his surrender? We venture to think a peremptory refusal. The ground for this refusal would be that the offense of which Bazaine was convicted, was, in its nature, a political offense. It is impossible, in our limited space, to discuss this question in all its bearings, but we can shortly give our reasons for this suggestion. Wherever an offense is committed, which is of a purely military character, and is not, in any

way, against the civil law, we venture to think that such an offense is essentially political; or, at any rate, it is *quasi-political*, to an extent that would afford a sufficient reason for refusing to surrender the offender. If a soldier shoots his officer, he is guilty, not merely of an offense against military discipline, but also of an offense against the laws of nature, and might be surrendered to take his trial for his offense against the latter system of law. But where an officer, through treachery or cowardice, surrenders his post to an enemy, his offense is of a totally different nature. He offends against a code of laws which is in direct conflict with the ordinary laws of nature, and which arises solely out of political combinations.

The code or military law which enacts punishment for such offenses has risen up gradually with the formation of standing armies, and standing armies are institutions which exist for the maintenance of the political entity of the States which they uphold. It is true that they are not intended to serve the purposes of any particular party in the State to which they belong, but they are the means of enforcing and upholding the position of the State in relation to other States. An offense against the military code governing a standing army is an offense against something which takes its existence from the policy of the State, and hence the nature of the offense (if of a purely military character) is treason against the State. That such is the character of the offense is evidenced by the severity of the punishment inflicted in time of war. Treason is an act, or it may be the omission of an act, which has for its object to overturn or injure the existing government of a State. Treachery or even neglect of duty on the part of a soldier or officer in time of war, and whilst employed as such, is an act of omission of which the effect is or may be, to overturn or injure his government by the defeat of its armies. Surely such an offense is in the nature of treason, and treason of the very worst character, for the person committing such an offense is a person trusted by the very government which he offends against. Of course there may be military offenses of a mixed political and civil character, and it would be the duty of a government to whom a requisition was made for the surrender of a military offender to inquire in all cases whether the offense partook in any way of a political nature. But where the offense is purely military, then it is, we venture to think, essentially political, and in no such case should a surrender take place. Hence our conclusion is that in this country, at least, Bazaine can live without fear of being forcibly restored to his island prison.—*Law Times*.

## BOOK NOTICES.

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• *A Treatise on the Law of Judgments.* By A. C. FREEMAN. San Francisco, Cal.: A. L. Bancroft & Co., Publishers.

We are the recipients of the above entitled work, edited by A. C. Freeman, a Solicitor of the Sacramento Bar, and published by A. L. Bancroft & Co., at San Francisco.

We know that the Bench and Bar of this country stand in very great need of just such a work as this one of Mr. Freeman's, the only one, as far as our knowledge extends, which even professes to treat of the matters considered in it. We were especially gratified to find several questions elucidated by the author which in our Courts, at least, have been clouded with obscurity and uncertainty, and which have given no little trouble both to the Bench and Bar. For instance, the questions which arise as to the entry of judgments *nunc pro tunc* where no judgment was rendered and where judgment was rendered but not entered, discussed in Chapter III.; amending judgments in Chapter IV; the record or judgment-roll in Chapter V., etc., etc. For the benefit of our readers we adopt the sub-divisions of the work given by the author in his preface: Part first, including chapters one to seven, shows of what the Record or Judgment-roll is composed, and states the various classifications and definitions of judgments and decrees, and the rules applicable to entries and amendments, and to the vacation of judgments at common law and under the Code. Part second, consisting of the eighth chapter, is devoted to the law in regard to jurisdictional inquiries in collateral proceedings. The ninth and tenth chapters constitute the third part, and are designed to show *what persons* are bound by the judgment by reason of their privity with the parties, or their interest in the subject of litigation, or through the operation of the law of *lis pendens*.

Part fourth treats of the important incidents attending judgments, viz: Merger, Estoppel and Lien, of the assignable qualities of judgments, and of their admissibility as evidence. Part fifth considers proceedings to revise judgments by *scire facias*, and to enforce them as causes of action or defense, with the rules of pleading applicable to those proceedings. The sixth part contains the chapters on Relief, Reversal and Satisfaction, showing for what causes a judgment may be avoided in equity, what are the effects of its reversal by some appellate tribunal, and what are the means and circumstances which produce its satisfaction. The seventh and last part treats of the different kinds of judgments, and the rules peculiar to each.

The book is written in "model style," plain, simple and to the point, and the authorities cited, as far as we have examined them, have been selected carefully and skillfully.

We congratulate the learned author upon the valuable addition he has given to the library of the lawyer, and venture the prediction that his work will be eagerly accepted by the profession, wherever it may be introduced.

We have recently received from Stevens & Haynes, Law Publishers, London, two works which we prize very highly: One entitled "A Treatise on the Doctrine of Ultra Vires," by Seward Brice; the other "A Treatise upon The Law of Extradition," by Edward Clarke. The first is a new work, and the only treatise, known to us, upon the subject. Indeed, the doctrine of Ultra Vires, is a new branch of the law, and has sprung up within the last twenty-five or thirty years and is growing every day to be of more importance. The work on Extradition is a second edition and embraces the changes which have been made since the publication of the first edition.

We have also received from Callaghan & Co., of Chicago, Illinois, a treatise on "Extraordinary Legal Remedies," embracing Mandamus, Quo Warranto and Prohibition, by James L. High. It is unnecessary to state that this treatise is upon a subject which is growing every day more necessary to be understood.

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*Criminal Code and Digest of Criminal Cases, decided by the Supreme Court of Tennessee.*

Compiled by Hon. JAMES QUARLES. Nashville: Tavel, Eastman & Howell. 1874.

This work will be found of invaluable assistance to practitioners in the Criminal Courts of this State. All the different classes of crimes and misdemeanors are arranged in chapters, alphabetically, with those sections of the Code defining them placed as head notes, and digested decisions of the Supreme Court, thereon, following. The arrangement is very admirable, and enables one with ease, to refer to the decisions on any point he may be examining. The well-known reputation, in this State, of General Quarles as an able and accurate, and long-time criminal pleader in our Courts, gives assurance of itself, that the cases digested in this volume reflect, with accuracy, the legal points decided,—which he claims to have been his ultimate and only object in its preparation.

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At the very latest hour of going to press we have received from Messrs. Claxton, Remsen & Haffelfinger, of Philadelphia, a copy of the second edition of "Flander's Treatise on the Law of Fire Insurance," and are necessarily compelled to postpone a notice of its contents until our next number. In his preface to this edition, the author states that he has endeavored to give the reader the results of judicial decision upon the several subjects contained in its pages since the publication of the first edition.

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